



# *Military Law Review*

THE SIXTEENTH ANNUAL EDWARD H.  
YOUNG LECTURE: A BICENTENNIAL VIEW  
OF MILITARY—CIVILIAN RELATIONS

**Donald N. Zillman**

LEGAL SERVICES DURING WAR

**Colonel Ted B. Borek**

NEW PROTECTIONS FOR VICTIMS OF  
INTERNATIONAL ARMED CONFLICTS: THE  
PROPOSED RATIFICATION OF PROTOCOL 11  
BY THE UNITED STATES

**Captain Daniel Smith**

THE RIGHT TO A FAIR TRIAL IN CRIMINAL  
CASES INVOLVING THE INTRODUCTION OF  
CLASSIFIED INFORMATION

**Major Christopher M. Maher**

**UNITED STATES V. KUBRICK: SCOPE AND  
APPLICATION**

**Major Carl M. Wagner**

RECENT REFORMS IN DIVORCE TAXATION:  
FOR BETTER OR FOR WORSE?

**Major Bernard P. Ingold**

BOOK REVIEW

PUBLICATION NOTES

Pamphlet

No. 27-100-120

HEADQUARTERS  
DEPARTMENT OF THE ARMY  
Washington, D.C., *Spring* 1988

## MILITARY LAW REVIEW—VOL. 120

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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Inquiries concerning subscriptions for active Army legal offices, other federal agencies, and JAGC officers in the 'ARNGUS not on active duty should be addressed to the Editor of the *Review*. The editorial staff uses address tapes furnished by the U.S. Army Reserve Personnel Center to send the *Review* to JAGC officers in the USAR; Reserve judge advocates should promptly inform the Reserve Personnel Center of address changes. Judge advocates of other military departments should request distribution from their service's publication channels.

**CITATION:** This issue of the *Review* may be cited as 120 Mil. L. Rev. (number of page) (1988). Each quarterly issue is a complete, separately numbered volume.

**POSTAL INFORMATION:** The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School,

U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and were replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101, and a cumulative index for volumes 102-111 appears in volume 111.

*Military Law Review* articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalog of United States Government Publications*; *Index to U.S. Government Periodicals*; *Legal Resources Index*; three computerized data bases, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infodata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

# MILITARY LAW REVIEW

## TABLE OF CONTENTS

<i>Title</i>	<i>Page</i>
The Sixteenth Annual Edward H. Young Lecture: A Bicentennial View of Military—Civilian Relations	
Donald N. Zillman .....	1
Legal Services During War	
Colonel Ted B. Borek .....	19
New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States	
Captain Daniel Smith .....	59
The Right to a Fair Trial in Criminal Cases Involving the Introduction of Classified Information	
Major Christopher M. Maher .....	83
<i>United States v. Kubrick</i> : Scope and Application	
Major Carl M. Wagner .....	139
Recent Reforms in Divorce Taxation: For Better or For Worse?	
Major Bernard P. Ingold .....	203
Book Reviews .....	239
Publication Notes .....	241

**SUBMISSION OF WRITINGS:** Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

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When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

**BACK ISSUES:** Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

**REPRINT PERMISSION:** Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

# THE SIXTEENTH ANNUAL EDWARD H. YOUNG LECTURE

## A BICENTENNIAL VIEW OF MILITARY—CIVILIAN RELATIONS

by Donald N. Zillman

*The Judge Advocate General's Corps has been fortunate to have a series of outstanding officers and attorneys leading the Corps through the years. The Edward H. Young Chair of Legal Education, established at The Judge Advocate General's School in 1972, recognizes Colonel "Ham" Young's contribution to the establishment of the first JAG School during World War II and the reestablishment of the School at Fort Myer during the Korean conflict. Colonel Young graduated from the United States Military Academy in 1918, with a commission as a second lieutenant, Infantry. He served with the Army of Occupation in Europe after World War I, and for the next eighteen years served in various infantry assignments and as a White House Aide during the Coolidge and Hoover administrations. In 1936, he was detailed to The Judge Advocate General's Department, and completed the requirements for the juris doctor degree over the next two years. He then became an Assistant Professor of Law at the United States Military Academy, where he wrote two textbooks on constitutional law. In 1942, he was appointed Commandant of the first The Judge Advocate General's School, at the National Law School in Washington, D.C. He remained as Commandant when the school transferred to the University of Michigan Law School in Ann Arbor seven months later. Colonel Young later served as Theater Judge Advocate of the United States Forces China, and as legal advisor to the United States Embassy and to the Far East United Nations War Crimes Commission. Colonel Young was a member of the first Judicial Council, which heard court-martial appeals immediately before Congress passed the Uniform Code of Military Justice, and in 1950 he reactivated The Judge Advocate General's School at Fort Myer, Virginia. Colonel Young retired in 1954, and passed away in November, 1987.*

*On September 24, 1987, Professor Donald N. Zillman of the University of Utah College of Law presented the sixteenth*

*Edward H. Young Lecture, discussing military roles and issues under the Constitution. Professor Zillman is a former judge advocate who served on the faculty of The Judge Advocate General's School. He has also been a Professor of Law at Arizona State University, Special Assistant Attorney General for the State of Arizona, and Director of the Energy Law Center at the University of Utah. Professor Zillman currently is a tenured Professor of Law and Director of Graduate Studies at the University of Utah. He has focused on military law, torts, and energy law in his teaching and has published numerous books and articles. His presentation provided an especially timely contribution to military legal education in the year we celebrated the Bicentennial of the United States Constitution.*

## I. INTRODUCTION

The topic for the 1987 Ham Young Lecture is certainly a natural in this bicentennial year. I want to look at the military aspects of the drafting of the Constitution. The military and its relationship to the new civilian government were major concerns of the Framers during those hot months in Philadelphia 200 years ago.

I would like to spend a good portion of time on the constitutional drafting sessions themselves. What were the military problems as perceived by the founders? What choices did they face? What eventual resolution did they reach to provide for military forces within a civilian government? From that background, what have 200 years of change wrought in that original structure? Which of the original problems continue as problems today? Which have vanished? What new developments have come along? Finally, I want to offer some thoughts about the relationship between military and civilian authority in contemporary America. These and other military-civilian relations matters strike me, as a civilian but a former member of the Corps, as among the most important constitutional and legal problems facing our society.

I begin with three assumptions. The first is that we, as a nation, want all of the military power that is necessary to achieve a broad variety of objectives. We may disagree as to the specifics of some of those objectives but there is no doubt that a significant military presence (a "world class" one, if you will) is desired by the large majority of the American people. The second assumption is that this fact is not likely to change within our professional lifetimes. As much as we would desire a world of guaranteed peace and harmony between na-

tions, I think we need only read the morning paper or look at the evening news to see that we are still a considerable distance from that point. The third assumption, and the one closest to the heart of my topic, is that we support the principle of civilian control of the military establishment. While we state that as a received truth, one of the points that I hope to make is there are many aspects to military-civilian relations. Many of them, I think, are overlooked.

## **11. THE FRAMERS AND THE MILITARY**

We return to Philadelphia in the Summer of 1787. The drafters of the Constitution assembled, but were not entirely sure where they were going. One of the fascinating aspects of our constitutional history was that there was no clear charter to the drafters of the Constitution that they were to scrap the Articles of Confederation then governing the post-revolutionary American society and write a new Constitution. That result evolved and was opposed by many members of society and some members of the Convention itself. The entire proceeding, to use the Duke of Wellington's description of Waterloo, was indeed a "close run thing." At numbers of points, the entire Convention could have fallen apart over fundamental differences between individuals and between state interests. While we can look back on it now and assume the certainty of the result—that the brilliant document that was the Constitution would be created by that body—that was by no means certain to the drafters at the time. They went through the struggles that we might have had if we were in their position, and probably left the Convention not entirely certain whether they had done a good thing.

The Convention faced four significant matters in structuring military-civilian relations in the new Constitution. The first was whether to have civilian control over whatever military establishment there was. The second was how permanent the military establishment should be. Do we create a standing Army and a permanent Navy? The third consideration was what division of military powers should exist between the civilian branches of the federal government (most significantly, the Congress and the President)? Lastly, what should be the division of responsibilities between the state governments (the framers of the new federal union) and the federal authority?

As we look at the background to 1787, we see a very significant public concern with matters military. The nation was less than five years removed from the Revolution and the peace settlement. The considerable majority of the participants in the Convention were either military participants in the War or closely involved in state government and the running of the military establishment during the War.



That revolutionary background brought forth clearly *the* leader of the new nation. Any discussion of the new president or chief executive focused on George Washington. It is interesting to speculate whether any other background than commander of the victorious army in the Revolution could have so elevated George Washington. Would he have reached that stage as one politician among others in the Continental Congress? Could he have reached that position as Virginia planter or businessman? Could he have reached that position as a significant intellectual force? I rather doubt it. The crucial factor in the preeminence of Washington was his military leadership.

By way of further background, several uncomfortable military situations faced the new nation. The British remained in some of the forts to the west. They remained in Canada. The Spanish were in Florida. Louisiana and the Mississippi River remained in foreign control. The Indian tribes were not entirely subdued. Several states were in a state of, if not disorder, at least threatened disorder. Putting these factors together, military choices could be very significant for the new nation.

Let us examine then the constitutional resolution of the four issues that I have just suggested: (1) civilian control, (2) the standing army, (3) the presidential-congressional division of power, and (4) the state-federal division of power. We begin with civilian control. Almost all of the framers were clear there *would* be something that we would, today, call civilian control—the civilians would run the military establishment. The argument tended to be over details. The principle was assumed. The background goes back to England in the 17th century. The English Bill of Rights firmly rejected placing military power entirely in the King, or, even worse, in a general. Section six of the Bill of Rights stated that “raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.”

That view carried over to the colonies. Thomas Jefferson, writing in 1774, complains of King George having made the military power in the new colonies superior to the civil.<sup>2</sup> The Virginia Declaration of Rights, two years later, contains language “that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and

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<sup>1</sup> 1 Wm. & Mary, ch. 2 (16 Dec. 1689), *reprinted in* 1 The Founder's Constitution 433 (ed. P. Kurland and R. Lerner 1987). [hereinafter Kurland].

<sup>2</sup> Thomas Jefferson, A Summary View of the Rights of British America, July, 1774, *reprinted in* 1 Kurland, *supra* note 1, at 440.

governed by, the civil power.”<sup>3</sup> That language carries over to the Declaration of Independence’s language that, in keeping standing armies without the consent of the legislature, King George rendered the military independent of, and superior to, the civil power.

Out of that background came the constitutional provisions dividing military power between the Congress and the President. These officials will be civilians chosen through an elected political process of one sort or another. The Constitution itself mandates no military officers.

The debate in Convention touched a number of points. On June 1st, Mr. Wilson worries about the presidency, fearing presidents start sounding like the British monarch, King George III, against whom the War had just been fought. He worries the British monarch exercises such legislative prerogatives **as** the powers of “war and peace.”<sup>4</sup> Several months later, on August 20th, Mr. Pinckney submits to one of the drafting committees a proposal to include in the Constitution language that “the military shall always be subordinate to the Civil power.”<sup>5</sup> For reasons that are not entirely clear, this language falls by the wayside. Neither the Constitution nor the Bill of Rights includes language of civilian supremacy over the military. But clearly, that message is impliedly endorsed in the drafting sessions, the Constitution, the ratification debates, and the Bill of Rights that follows.

The second issue is the permanence of the military establishment. Should the nation have a standing army? “Standing army” is the phrase used in debate after debate, in writing after writing at the time. The background from English history already has been mentioned. Parliament feared an army might exist without proper civilian supervision and without proper civilian authority to terminate it if an Army seemed inappropriate. George Washington, in 1783, shortly after the end of the Revolution, gives his opinion on what sort of military establishment is needed. Washington concedes that probably it is “indispensably necessary” to have at least some small permanent establishment manning the coastal forts and guarding a few of the frontier posts. Beyond that, Washington hopes that nothing else is necessary. He opposes the large permanent standing army as dangerous to the liberties of the country.<sup>6</sup>

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<sup>3</sup>Virginia Declaration of Rights, June 12, 1776, § 13, *reprinted* in I Kurland, *supra* note 1, at 7.

<sup>4</sup>M. Farrand, I The Records of the Federal Convention of 1787, at 66 (1911) (all extracts from James Madison’s Journal).

<sup>5</sup>II *id.* at 341.

<sup>6</sup>George Washington, Sentiments on a Peace Establishment, May 2, 1783, *reprinted* in III Kurland, *supra* note 1, at 128–29.

The constitutional drafters essentially compromised on the issue. They gave Congress the discretion to create the Army and the Navy. The armed forces are not constitutional mandates. The drafters also recognized the need for time limitations on Army expenditures. Congress must reauthorize Army expenditures every two years. On the other hand, in these provisions there is the implied recognition of military permanence. The debate of the drafters gives a flavor of this. Mr. Mason of Virginia, on the 18th of August, opposes the standing army in peacetime except for the few garrisons, borrowing the George Washington concept.<sup>7</sup> Elbridge Gerry, one of the strong opponents of a too-grand federal scheme, remarks that there is “no check here agst. standing armies in time of peace.”<sup>8</sup> Gerry’s proposal, one of the notorious moments of the convention, is that no more than two or three thousand men would be allowed in the standing army.<sup>9</sup> He wants to write that into the Constitution itself. At that point it is rumored, that General Washington, in the presiding chair, leans over and tips off General Pinckney to say this is satisfactory so long as any invading force also agrees to keep their army to no more than a few thousand. The Gerry motion dies amidst laughter and ridicule, the incident again suggestive of the influence of Washington as the leader, both politically and militarily, of the proceedings. On September 5th, Mr. Gerry comes back, objecting to the proposal that no appropriation for the army shall be for more than two years. Gerry suggests cutting that down to one year.<sup>10</sup> That is debated and rejected. In the final days of the session, some of the members of the Convention, very much torn in their own minds over the direction of the debate, focus heavily on some of the military provisions. Mr. Randolph objects on September 10th to the lack of a prohibition of a standing army.” Four days later, Colonel Mason weighs in. He’s not absolutely certain that he wants the prohibition on standing armies, but he’d like some stronger language about the dangers of the standing army.” He tries to get that language but again doesn’t succeed. The next day Mr. Gerry again objects to the general power to raise armies and money without limit.<sup>13</sup> The Convention adjourns on September 17th and all three, Randolph, Gerry, and Mason, refuse to sign the document. They regard it unsatisfactory, in good part for the military reasons.

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<sup>7</sup>II M. Farrand, *supra* note 4, at 326

<sup>8</sup>*Id.* at 329.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 509.

<sup>11</sup>*Id.* at 563.

<sup>12</sup>*Id.* at 616–17.

<sup>13</sup>*Id.* at 633.

Controversy continues after the Convention. Some of the most vigorous debate comes when the draft is put out for ratification by the necessary nine states. In the Virginia ratifying convention, during the summer of 1778, the proposal is put forward that “no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present in both houses.”<sup>14</sup> Virginia eventually rejects the proposal. James Madison writing to Thomas Jefferson states the opposition case. Madison states: “I am inclined to think that *absolute* restrictions . . . are doubtful. . . . Should an army in time of peace be gradually established in our neighborhood by [Britain] or Spain, declarations on paper would have . . . little effect in preventing a standing force for the public safety.”<sup>15</sup> In effect, practical politics will overrule any declaration in the Constitution if the declaration doesn’t make military sense. That logic carries the day.

A further suggestion comes from the anonymous commentator Brutus, writing in January 1788 against the adoption of the Constitution. He opposes standing armies and then throws in a gratuitous dig, noting that a standing army does provide a “decent support, and agreeable employment to the young men of many families, who are too indolent to follow occupations that will require care and industry.”<sup>16</sup> Nonetheless, standing armies were authorized and remain with us today.

The third of the great issues before the drafters was the division of powers between Congress and the President. We’ve already seen that resolution of the civilian control issue gave both of these a major say in military policy in the country. The British experience again troubled the drafters. The fear was that the king exercised far too much power over the military. Blackstone’s Commentaries describe the king as having “the sole prerogative of making war and peace.”<sup>17</sup> The limited Parliamentary power of financial control was not always exercised sufficiently. The Constitutional Convention crafted the delicate balance of authority between President and Congress that continues to delight and trouble us today. The President is given the power of commander-in-chief. The President is given the power of appointment of officers. The President is given some role in legislative affairs—to recommend to the Congress such measures as seem ap-

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<sup>14</sup>Virginia Ratifying Convention, Proposed Amendments to the Constitution, June 27, 1778, 9th Proposed Amendment, *reprinted in* I Kurland, *supra* note 1, at 474.

<sup>15</sup>I Kurland, *supra* note 1, at 477.

<sup>16</sup>Brutus, No. 9, January 24, 1788, *reprinted in* III Kurland, *supra* note 1, at 149.

<sup>17</sup>1 W. Blackstone. Commentaries \*249.

propriate. The President is given substantial authority in foreign policy. The Congress is given the power to declare war. The Congress is given the power to create, establish, and maintain the Army and Navy. The Congress is given significant authority over the militia. Any good lawyer would appreciate the considerable potential for tension in this division of responsibility. Yet the drafters certainly avoided the British fear of putting all of the military authority in one civilian or in one civilian office.

The debates at the Constitutional Convention on this issue are very vigorous. On June 1st, Mr. Pinckney, in the discussion of the nature of the presidency, says he's generally afraid of executive powers, particularly as they may extend too far in war and peace issues.<sup>18</sup> Mr. Rutledge concurs with that position. Mr. Wilson adds that he fears the president starts to look like the British king, against whom the Revolution has just been fought. On June 4, Mr. Gerry comments on the curious proposition to create three chief executives, a multi-headed presidency as it were. Gerry, for once taking a more federalist pro-military position, says he's very uncomfortable with the concept of a "general with three heads."<sup>19</sup> Interesting discussion follow. Suppose war breaks out in South Carolina—will the South Carolina president put all the troops down there when the Massachusetts president says they should be up in Massachusetts and the New Jersey president is a little uncertain where they should be? That doubt helps defeat the proposition for the three-headed presidency." On July 20th, Mr. Randolph again raises executive abuse of power. He fears such abuse, "particularly in time of war when the military force, and in some respects the public money, will be in [the president's] hands."<sup>21</sup> The debate shifts to the war-making authority itself. Mr. Pinckney is concerned with giving too much power to the legislature. Legislative "proceedings were too slow."<sup>22</sup> Military matters require quick attention very often. The House, in contrast to the Senate, Mr. Pinckney feels, is too large a body to engage in intelligent debate over war-making authority. Mr. Butler urges giving the power to the president. He says the president "will not make war but when the Nation will support it."<sup>23</sup> Debate follows on whether to change the language, "make" war to "declare" war? Mr. Gerry checks in every now and then with his concern about abuses of power, particularly by the president. Mr. Mason opposes too much power in the president in war

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<sup>18</sup>I M Farrand, *supra* note 4, at 64-65

<sup>19</sup>*Id.* at 97

<sup>20</sup>*Id.*

<sup>21</sup>II *id.* at 67

<sup>22</sup>*Id.* at 318

<sup>23</sup>*Id.*

matters because he's not safely to be trusted with it. This is the cynical view of government coming out of the revolutionary experience. Mason's position is, let's make war hard to make and peace easy to make.<sup>24</sup>

The debate goes on in the ratifying conventions in 1788. At the Virginia convention, Mr. Mason speaks of the danger of the president actually commanding the forces. Having made the president commander-in-chief, does this mean that he gets on the white horse and goes out to lead the troops? There are two risks seen in that. First, he may not be any good. A civilian, hopeless in military matters, will be a disaster to the country. Second, just the flip side—the president may be very good indeed as a commander-in-chief. Suddenly all power starts coming to the commander-in-chief; Congress falls by the wayside, state power falls by the wayside, and you have a Caesar in American clothing. Mason proposes requiring the permission of both Houses of Congress before the president actually exercises field command.<sup>25</sup> The proposal fails in the Virginia convention.

The North Carolina ratifying convention has a different concern. Should the Constitution give greater power to Congress over the conducting of military campaigns? Mr. Miller proposes that Congress should have the authority to “direct the motions of the army.”<sup>26</sup> Do we fight in this pasture or the next one? Mr. Spaight, one of the drafters of the Constitution, remarks that this would have been a clear formula for disaster in the Revolutionary War. The proposal for greater congressional power fails in the ratifying convention.

The fourth consideration for the drafting convention is the military relationship between the federal government and the states. In looking back 200 years, it seems curious that these are the military issues that take most of the time of the drafters. Some of the significant provisions get very little consideration. Someone drafts the initial proposal, and the members approve it with little change and very limited debate. Not so the provisions involving the militia. That was as hot a topic as there was.

Debate begins from the background of the militia tradition in the states. Some of that is borrowed from England. The new federal government threatens the whole minuteman tradition, the concept of groups of local citizens getting together to form the military power, whether against the Indians or for wars against the European powers. The Virginia Declaration of Rights of 1776, right at the start of the

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<sup>24</sup>*Id.* at 319.

<sup>25</sup>IV Kurland, *supra* note 1, at 7

<sup>26</sup>*Id.* at 8.

Revolutionary War, states that “a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.”<sup>27</sup> The contrast is to that great fear of many of the drafters—the standing army.

The Massachusetts Constitution of 1780 reflects the political nature of the state militia. The document provides: “The Captains and subalterns of the militia shall be elected by . . . their respective companies.” We sit down and we vote who is going to run the company. Higher officers are elected by their subordinates; major generals are appointed by the legislature.<sup>28</sup> If you seek a formula for bringing politics into your military bodies, I can’t think of a better one than that. Politics will decide who should be running the lower unit and who should be controlling the entire body.

A second factor in the debate at Convention is the memory of the Revolutionary War and the very mixed success with state-controlled troops throughout. Alexander Hamilton, writing in 1778, in the midst of the War, complains particularly about the Continental Congress. He says their “conduct with respect to the army especially is feeble, indecisive, and improvident.” Their failures to provision and “whimsical favouritism in their promotions” have hurt the Army.” Hamilton observes: The confederation gives the states too much influence in the affairs of the army. Some of the troops would obey their own state’s direction rather than the national congress.<sup>30</sup>

At the Convention, the drafters are aware of the continuing need for military power. There are threats from foreign governments—the British and Spanish. There are the continuing Indian concerns. Thirdly, there is major concern over insurrections in the states. From this comes the feeling that one focus of national military power has to be keeping different states off each other’s backs and keeping some established government within existing states. Mr. Randolph, on May 29th, early in the Convention, worries about “dissentions between members of the Union” and “seditions in particular states” under the existing confederation.<sup>31</sup> On June 8th, Mr. Gerry worries about taking power away from the militia. He fears a federal legislative power to control the state militia, believing that it would extend to the regulation of the militia, a matter on which the existence of the states

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<sup>27</sup>Virginia Declaration of Rights, June 12, 1776, sec. 13, *reprinted in* I Kurland, *supra* note 1, at 67.

<sup>28</sup>Massachusetts Constitution, 2 March 1780, Executive Power X, *reprinted in* I Kurland, *supra* note 1, at 67.

<sup>29</sup>I Kurland, *supra* note 1, at 149.

<sup>30</sup>*Id.* at 150.

<sup>31</sup>I M. Farrand. *supra* note 4, at 18.

might depend.<sup>32</sup> On July 5th, Gouverneur Morris, urging unity in the area, notes that if we can't come up with a new constitution, the "scenes of horror attending civil commotion can not be described."<sup>33</sup> Mr. Gerry has a further concern in the area, the formation of new states beyond the original thirteen. He offers the fascinating proposition that no more than thirteen further states ever be admitted to the union.<sup>34</sup> Why? The danger is the new states will outweigh the old? The focus again is state versus state. The drafters expend considerable time on federal regulation and discipline of the militia. General Pinckney favors some but not too much uniformity. He recalls that during the Revolutionary War the "dissimilarity in the military of different States had produced the most serious mischiefs" on the battlefield.<sup>35</sup> Mr. Dickinson, weighing in on the other side, says the states never should give up their power and authority over the militia.<sup>36</sup>

Out of this the drafters fashion another compromise between the states rights view and the national authority view. By and large, the national authority gets the better of it. Congress, among its powers, has the authority to call the militia into federal service for specified purposes. The purposes are repelling invasions, executing the laws, and suppressing rebellions. Congress also receives, though not in express terms, much of the power of the purse over the militia. Congress has the power to provide for organizing, arming, and disciplining the militia, and governing the parts of them in federal service. On the other side of the compromise, states retain the power of appointment over officers and the authority to train the militia according to the discipline prescribed by Congress. That's the constitutional compromise. The details are left to be worked out over the years to come.

At the ratifying conventions, the battle over the militia clauses continues. The New York ratifying convention in 1788 considers a proposed amendment that the militia "shall not be marched out of such state without the consent of the executive thereof."<sup>37</sup> The result would let the states keep a close hold on "their" troop. Hamilton, writing in the *Federalist*, states the opposing view. The militia by itself is not going to be adequate military force for the new nation. Hamilton argues that the "steady operations of war against a regular and disciplined army can only be successfully conducted by a force of

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<sup>32</sup>*Id.* at 165.

<sup>33</sup>*Id.* at 530.

<sup>34</sup>*II id.* at 3.

<sup>35</sup>*Id.* at 330.

<sup>36</sup>*Id.* at 331.

<sup>37</sup>*III Kurland*, *supra* note 1, at 211.



the same kind.”<sup>38</sup> The minuteman or the militia is not going to be adequate in Hamilton’s view. “War,” he continues, “like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.”<sup>39</sup> That’s the view that, over time, carries the day.

## 111. THE FRAMERS’ CONCERNS TODAY

The Constitution is ratified by 1789, its military provisions intact. What happens to the concerns of the framers during the next 200 years? Some of the great compromises continue to be fundamental debates in the military-civilian world. Other issues have virtually disappeared. One side or the other of the question has won and we spend very little time thinking about, debating, or reassessing the constitutional language. Lastly, a number of issues; not thought through by the framers, have emerged today as significant issues for the military lawyer and for any intelligent person thinking through military-civilian relations in the country.

First, assess the four concerns of the framers. Civilian control is in one sense a nonissue. If the only definition of civilian control over the military is “if you don’t have any coups, you don’t have any problems,” we’ve been remarkably successful. The rare occasions where the issue shows up, General MacArthur versus President Truman, General Singlaub versus President Carter, very clearly the civilian, the president, wins. Who could imagine that it would be otherwise, that the general or the admiral would be able to tell the president how to run military or foreign policy? We continue to articulate the concerns over too much military authority in the continuing tinkering with the national command structure. Since the National Security Act of 1947,<sup>40</sup> and the statutory creation of the Joint Chiefs of Staff, a strong principle running through every revision of that statute, including the most recent, has been the need to maintain civilian control. We as a nation are very uncomfortable with anything that resembles our perception of the German General Staff. We don’t want to centralize too much authority in the uniformed members of the military because they might abuse it. Well, certainly by an objective

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<sup>38</sup>The Federalist, No. 25, at 211 (A. Hamilton) (B. Wright ed. 1961).

<sup>39</sup>*Id.*

<sup>40</sup>National Security Act of 1947, ch. 343, § 2, 61 Stat. 495, 496 (“unified direction under civilian control”); Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 2, 72 Stat. 514, 514 (“to provide for their unified direction under civilian control”).

examination, the military has been exemplary in their refusal to take power from the civilians. The American military stands as the ideal to the world in this regard. Therefore, if your only focus is “no coups, no problems,” we could leave the civilian control issue. But I would suggest that we not overemphasize the need for civilian control. Let me be quite clear—I am a strong advocate of civilian control. But, we must recognize that we can do jeopardy to the goals of civilian control and to other fundamental interests by blindly siding with the “civilian” position in any debate with the “military” position. We need good legal study on how we command our forces. A consequence of too much fear of a military takeover has been the continuing support of sharp divisions between the services. Would we have the same distinction between Army, Navy, Air Force, and Marines if we had different concepts of civilian control?

The second of the founders’ concerns was the standing army. If there’s any one of the debates that has been clearly won by one side, I suspect it has been this. We have certainly, ever since World War II, and probably long before that, recognized that the United States needs a standing army and permanent navy. The topic does not receive significant debate. We fight over the exact numbers. Do we create addition divisions? Do we need new wings? Should we go to a sixteen-carrier navy? But, in light of a vastly changed international picture and a vastly changed perception of what the United States is about, all serious policymakers and policy analysts assume that we will need a major permanent military establishment.

What are the consequences of the recognition of the permanent military establishment? One, we have ended significant worry about conflicts between the states or rebellions within states. We will continue to have such internal disturbances from time to time. But the military bottom line is pretty sharply settled. There is ample federal military authority to handle any threat. There are no debates today about whether, if the United States is invaded in South Carolina, troops native to Colorado or New York will fight the invaders. We know that they will. Nothing would more unite the American people than that. A second benefit of the standing army is the creation of the professional officer and enlisted ranks in the military. By contrast, suppose we continued to live in a world where it was very uncertain whether the next session of Congress would renew a significant portion of the uniformed military. Probably every one of you would have some very different career expectation and ideals. One of the benefits of the permanent military is that we have gone a long way towards taking political considerations out of military personnel matters. This

is most crucial within the officer corps. By contrast with today I would urge you to review your Civil War history to get a real sense of partisan politics mixing with military personnel policy. We see far less of that today. It's one of the consequences of accepting a standing army and permanent navy as part of the American system.

The third concern, the division of authority between the President and the Congress, is the hottest of the four concerns. We are working towards a resolution in the United States Supreme Court of the War Powers debate. Over the last two decades Congress has attempted to move in on some prerogatives traditionally viewed as presidential. The President has attempted to move in on prerogatives traditionally viewed as congressional. The War Powers Resolution is just one illustration of Congress' increasing eagerness since the end of the Vietnam War to play a larger role in matters military and political. In a dozen significant enactments Congress has made such significant decisions on foreign policy as tying most favored nation trade status to Soviet immigration policies and continuing or terminating aid to various insurgent groups. By the same token, the President, particularly in budgetary matters, has taken on a far more significant role than I think the drafters of the Constitution planned. Very often Congress is in the position of reacting to the presidential program for new legislation. The mix between presidential and congressional authority over what dollars get appropriated, what new programs are started, and what old programs are terminated, has become blurred over the last two decades.

The fourth consideration is the state-federal relationships. Once again, the advantage has gone very strongly to one side of the controversy. Essentially, the federals have won, the states righters have lost. We certainly continue a significant state military presence in the National Guard. But as a fundamental matter, the dollars to support it and the power to use it are federal. If, in the extreme, state interest opposes federal interest, the power is on the federal side. There is no better illustration than the possibly apocryphal story coming out of the school desegregation crises in the 1950s. Leander Perez, the legendary die-hard segregationist, head of Plaquemines Parish in Louisiana, encounters one of Louisiana's senators, probably one of the Longs, and tells him "If things come down to it, we're ready to fight with the federals [read Yankees], before we give up our segregated way of life." Senator Long, puts his arm around Leander Perez, and says, "Leander, you don't understand. The Feds have got the atomic bomb." And so it remains. Significant state authority continues, but the federal government has the major control over the

military within the country. There's no sign of that changing in any hurry.

## IV. CURRENT ISSUES

I close with some thoughts on issues facing us today. I hope that I can stimulate some of you, as you contemplate your further military legal education, to consider topics of research. Civilian-military relations is a vast field and it's one that is little studied by lawyers. Far more deserves to be written. Let me suggest three concerns that I have.

The first concern is the proper role for military expertise in our civilian-controlled system. We can exalt civilian control of the military to the point that the civilians should do everything, and the uniformed military do nothing that involves any judgments or setting of policy. Certainly, on some matters that's the system that we desire. But I'm concerned after reading some of the history of American military policy over the last twenty years. President Johnson, in the Vietnam War, directs specific bombing strikes. President Carter, during the Iranian hostage rescue, insists on virtually hour-by-hour command of the operation. Any number of congressional staffers and members of Congress appear to want to write the specifics of military maneuvers or military budgeting decisions. I fear we may have reached the point that everyone in the executive branch or the Congress has looked deep down inside themselves and assumed there is a general or an admiral there. I think we need to spend some time articulating the particular virtues and benefits of military training. What areas of expertise define the military professional? Just as we should be cautious about telling brain surgeons how to perform brain surgery, or lawyers how to structure a complex trust agreement, we should be cautious about telling trained military leaders the day-to-day workings of their business.

This leads to my next concern: the direction of the career of the military officer. We've seen a good deal of commentary since the Vietnam War about the effectiveness of the American military. One of the stronger indictments is Richard Gabriel's *Military Incompetence*.<sup>41</sup> The author is a person familiar with the military. Gabriel writes, "It might be argued, for instance, that the American military is fairly good at taking advantage of developing technology, or that its officer corps is the best educated in the world, or that its values clearly reflect those of the larger society which it defends. . . . But if

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<sup>41</sup>R. Gabriel, *Military Incompetence* (1985)

it cannot fight and fight well, if its operations go wrong consistently, then all the rest is pointless. It is a sad fact that in the last fifteen years [since 1970] every time the American military has gone into action it has been an embarrassment.”<sup>42</sup> The military officer, in Gabriel’s point of view, has become far too much the bureaucrat and manager, and not nearly enough the fighter and the leader. Gabriel’s view is controversial. I have significant disagreement with elements of it. Nonetheless, I think there is an element of truth in some of what Gabriel says. I think it behooves us, in considering military-civilian relations, to see what the current structure is doing to the officer corps.

Consider three atypical, but very prominent, members or former members of the officer corps. What do their careers suggest? The three officers are former General (now retired) Peter Dawkins; former Chief of Staff, and recently a presidential candidate, General Alexander Haig; and Lieutenant Colonel (now also retired), and former congressional witness, Oliver North.

We start with General Dawkins. During my time as a young captain and continuing for at least a decade beyond, Pete Dawkins was portrayed as the ideal future Chief of Staff. He had it all—West Point football hero; Rhodes Scholar; bright, forceful leader; the proper Vietnam experience; and the right sponsors. Everything suggested that his career was proceeding brilliantly. Then he makes the sudden decision to leave the service to move into business, and possibly politics. Certainly, this is business’ or politics’ gain. But what does it say both about the military and what does it say to younger officers? We can try to make judgments. Is this the yuppie age of economic motivation? How can anyone turn down the wealth that goes with a top job in corporate America to remain on the low pay, by comparison, of a general officer? Or are the other perks in civilian society, not necessarily financial, simply so much more attractive on the civilian side, that you tend to lose your best officers? General Dawkins may or may not have left for these reasons, but such a trend concerns me greatly. Thinking back to previous generations, what would have been the consequence in that long, slow-promotion period between World War I and World War II, when Dwight Eisenhower and others served for years as junior officers with no certain prospects of promotion and no guarantee that a World War II would be coming along, if the Eisenhowers dropped out? Top military leadership is not fungible. The society that assumes it is and that loses its best generals

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<sup>42</sup>*Id.* at 187.

and admirals to other pursuits had better hope that war-peace issues are low on the national agenda in decades to come.

General Haig is a favorite study of mine in military-political relations. He mixes the political and military worlds as much as we've seen in this generation. Haig is not your typical general in politics. Unlike former military men who entered government or politics, Grant or Eisenhower or George Marshall for example, Haig used the military to play for political advantage. Colonel Haig moves into Henry Kissinger's establishment in the National Security Council, and then rises over several hundred senior officers to quick promotion and eventually the post of Vice Chief of Staff and later Supreme Allied Commander in Europe. This was not merely by virtue of his distinctive combat skills and his military leadership ability, but by his remarkable, undeniable skill in military-political relations.

Lieutenant Colonel North is my third study. Colonel North certainly follows part of the Haig model. Find yourself in a visible governmental spot, do significant things to impress important superiors in the political world as well as the military, and see what that will do for your career. Colonel North is also the frustrated warrior. One of the difficult concerns for the military and the civilians who make its laws is: How do we train people to be the very best at fighting, and then recognize that those talents are going to be kept on a very short leash if the world continues to exist as we want it? Colonel North reflects that dilemma. He first achieves recognition as a warrior, an excellent one by all accounts, in Vietnam. His White House position lets him exercise some of those talents—quick judgment, personal courage, ability under stress, cutting through or working around bureaucracies. Enemies are clearly defined and stakes are life and death. Yet the virtues of the battlefield are not necessarily those of the National Security apparatus. The frustrated warrior can get things done. But they may not be what all parts of the civilian government wants done.

The third and final concern that I have is whether we can get our political system to rise above parochial concerns. In Tip O'Neill's phrase, "All politics is local." While we recognize the global impact of military policy and foreign policy, many political decisions focus on local issues. The military has recognized quite effectively that there is no better way to get a major weapons system funded than to

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<sup>43</sup>See Zillman & Imwinkelried, *The Legacy of Greer v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 Georgetown L.J. 773, 795, 796 (1977).

lobby individual congresspersons, saying, "Look what we can do for your district, in terms of jobs, or of a more active military presence." It becomes very hard for the collective Congress to resist that. Some of the defense spending figures highlight the problem. A 1983 study reports twelve companies doing over one billion dollars of business yearly with the Department of Defense. Five companies did over 50% of their total business with the Defense Department—General Dynamics, **74%**; MacDonnell Douglas, **54%**; Hughes Aircraft, **59%**; Grumman, **76%**; Northrup, **74%**.<sup>44</sup> President Eisenhower's farewell message warned of the military-industrial complex. The complex has now become military, industrial, and political. These issues, too, need study and, in many cases, improvement.

## V. CONCLUSION

I hope I have suggested areas where your further study can be significant, both to the military and to the civilian world. It is a sad but accurate fact that we are creating two isolated communities of military officers and lawyers. Only the small number of military lawyers are familiar with both the military and the American legal system. As I look at my civilian colleagues in legal education, the vast number have had no experience in the military. They have not been judge advocates, enlisted personnel, or non-JAG officers. Of my twelve younger colleagues on the Utah faculty, none has had so much as one day in uniform. Much of the intelligent study of the law of military-civilian relations will need to be done by The Judge Advocate General's School and by those the School can encourage to do creative thinking in this area. Your training gives you perspectives on both camps. You know the military as an officer. You know the civilian legal system by virtue of your training in civilian law school, and your continuing lifelong legal education. I commend the area to your attention. It will allow a splendid blending of the soldier and the lawyer in service to your nation.

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<sup>44</sup>A. Yarmolinsky & G. Foster, *Paradoxes of Power* 58 (1983).

# LEGAL SERVICES DURING WAR

by Colonel Ted B. Borek\*

## I. INTRODUCTION

*‘We learn from history that we do not learn from history.’*

This article examines legal services during war. Its purpose is to help staff judge advocates and commanders plan and train for the deployment and use of legal assets during periods of conflict. To be prepared to provide adequate legal services in any future conflict, the Judge Advocate General’s Corps must continue to develop and implement initiatives in training and doctrine that will ensure successful delivery of total legal service support on the AirLand battlefield.

As the Staff Judge Advocate of a division in Germany from 1984 to 1986, I confronted potential war deployment issues with little information available to help solve the problems. I decided that a historical examination of problems and issues confronting staff judges advocates during war was an important problem-solving resource. I knew that deployment plans varied greatly among division judge advocate offices in Germany. Some divisions centralized judge ad-

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vocate assets in the Rear and others dispersed them with the brigades, but these deployment schemes were based largely on peacetime geographical boundaries. I asked myself some fundamental questions. Where were legal assets positioned in past conflicts? Similarly, there was debate about whether court-martial cases would be tried during early stages of any conflict. How soon after beginning past combat operations did trials begin? Also, I believed that staff judge advocates should be familiar with substantive issues confronted in past conflicts to anticipate future needs, especially for purposes of training. War-time needs are likely to vary from peacetime needs, but how? After-action studies from World War II suggested that "enough prior study had not been given to many of the topics" Army lawyers encountered.<sup>1</sup> Is such criticism still valid? Finally, there were differences among senior judge advocates about general deployment doctrine.<sup>2</sup> The debate asked whether legal offices should be deployed with divisions in combat, or would the command be served better with lawyers assigned to echelons above the division?<sup>3</sup> Historical experience might provide relevant illustrations of the types of services to be provided at different echelons of command<sup>4</sup> and, in this way, be a guide for current doctrine?

Using a historical approach, this article attempts to answer these questions and identify the topics that Army lawyers and commanders must consider if we are to provide quality legal services in future conflicts. Procedurally, I had hoped to review documents about judge advocate services in World War II, Vietnam, Korea, and Grenada. Unfortunately, I found a dearth of material about the Korean conflict,<sup>5</sup> and many of the historical reports from Vietnam are still classified. Consequently, this study focuses on judge advocate services in the European Theater of Operations during World War II and on the Grenada operation. Regarding World War II, notable emphasis is placed on Judge Advocate Studies from the Report of the General

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<sup>1</sup>Report of the General Board, United States Forces European Theater, Legal Questions Arising in the Theater of Operation 1 (General Order 128, 17 June 45), (retained by the Army Military History Institute) [hereinafter Study 871].

<sup>2</sup>E. A. Gates & G. Casida, Report of The Judge Advocate General by the Wartime Legislation Team 48 (Sept. 1983).

<sup>3</sup>*Id.*

<sup>4</sup>Compare U.S. Army Training and Doctrine Command Pamphlet No. 525-52, Military Operations, US Army Operational Concept for Providing Legal Services in Theater of Operations (21 Mar. 86) [hereinafter TRADOC Pam. 525-52] with Dep't of Army Field Manual 100-16, Support Operations: Echelons Above Corps, at 7-10 to 7-11 (April 1965).

<sup>5</sup>One notable exception from Korea is the Interim Historical Report, War Crimes Division, Judge Advocate Section, Korean Communications Zone (& tract cumulative to 30 June 1953). Annual Historical Summaries of the Military Assistance Command, Vietnam, retained at the Center for Military History, Washington, D.C., are being declassified. See also G. Prugh, Vietnam Studies, Law at War: Vietnam (1975).

Board, U.S. Forces, European Theater, and on after-action reports of the U.S. 12th Army Group and the First, Third, and Fifteenth Armies. For Grenada, most information comes from personal interviews of participants and from after-action reports of the 82d Airborne Division, the XVIII Airborne Corps, and the United States Army Claims Service.

## 11. EUROPEAN THEATER, WORLD WAR II

### A. OVERVIEW

To prepare for the Normandy invasion, United States Army personnel arrived in the British Isles shortly after the United States entered the war. In March 1942, a staff judge advocate was designated for Headquarters, United States Army Forces in the British Isles, and in the early summer of 1942 the European Theater of Operations, United States Army (ETOUSA), began to function in **London**.<sup>6</sup> To support the theater, a branch office of The Judge Advocate General and a board of review were established in **May** and became operational by July 1942.<sup>7</sup> In the spring of 1944, as the invasion drew near, a forward echelon of Services and Supply was established with a Judge Advocate **Section**.<sup>8</sup>

Many units with judge advocates participated in the invasion and supported operations thereafter. The principal United States ground forces in the European Theater were two army groups and five field armies, with an average of two to four *corps* per army and two or more divisions per *corps*.<sup>9</sup> Each of these units had judge advocate officers. In addition, base section offices with judge advocates were

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<sup>6</sup>Report of the General Board, United States Forces, European Theater, Judge Advocate Section in the Theater of Operations, at 1, 2 (General Order 128, dated 17 June 45) (retained by the Army Military History Institute) [hereinafter Study **821**].

<sup>7</sup>I History of the Branch Office of The Judge Advocate General with the United States Forces, European Theater, 18 July 1942–1 November 1945, at 21 (1 Nov. 1945) [hereinafter TJAG Branch History]. The history of the Branch Office and Board of Review was written to provide a treatise for future guidance about the many administrative and military justice problems confronted in the European Theater. *Id.* The two-volume work contains a compilation of statistical data about courts-martial as well as background information on constitutional, evidentiary, and substantive legal issues considered by the Board of Review.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* First United States Army Group was activated in the United Kingdom on October 19, 1944. The 12th Army Group also was activated in England; it became operational in France on 1 August 1944, the same day as Third United States Army. At that time General Omar N. Bradley became commander of 12th United States Army Group with authority over First Army, commanded by General Courtney N. Hodges, and Third Army, commanded by General George S. Patton. By January 1945, 12th Army Group consisted of the First, Third, and Ninth Armies, including 8 corps, 23

located throughout liberated territory. By the end of the war roughly 485 judge advocates supported 118 general court-martial jurisdictions, usually units of division size or larger.<sup>10</sup>

Recalling the operational setting will facilitate understanding of judge advocate services. While it took allied units about six weeks after landing at Normandy to establish a front line about twenty miles from the coast, by August 31, 1944, elements of General Patton's Third Army crossed the Meuse River at Verdun, about 300 miles to the east.<sup>11</sup> The Allied front line continued eastward, and by mid-December, when the Germans launched their counteroffensive in the Ardennes, the Allied Armies had liberated France and reached the German border. After the Allies contained the German offensive, they moved eastward again. In early March 1945, Patton's Third Army raced sixty miles in three days to reach the Rhine River near Coblenz.<sup>12</sup> The First and Ninth Armies reached the Rhine to the north of the Third Army about the same time. When the war officially ended on 8 May 1945, Allied forces had travelled as far as the Elbe River, about 500 miles east of Normandy. The Allied front line extended into Czechoslovakia and Austria as well.

Judge advocate offices moved many times in support of combat operations. For example, General Patton's staff judge advocate believed that his office moved seventeen times while going through France.<sup>13</sup> The Judge Advocate Section generally stayed with the rear echelon and operated from tents. Trials sometimes were held in the open air.<sup>14</sup>

## ***B. JUDGE ADVOCATE ORGANIZATION***

There were a number of differences in judge advocate offices of World War II that should be recalled. For example, there was no requirement for a lawyer to represent an accused, even in general courts-martial. The Articles of War provided only for the detail of an

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infantry divisions, and 7 armored divisions. By VE Day, 8 May 1945, 12th Army Group also included Fifteenth Army. Report of the General Board, United States Forces, European Theater, Strategies of the Campaign in Western Europe, 1944–1945, section 7 (General Order 128 dated 17 June 1945) (retained by the Army Military History Institute) [Study No. 11. See also R. Weigley, *Eisenhower's Lieutenants* (1981) for a thoroughly annotated description of the campaign and units, and L. Montross, *War Through the Ages* (3rd ed. 1960).

<sup>10</sup>TJAG Branch History, *supra* note 7, at 1.

<sup>11</sup>B. H. Liddell Hart, *History of the Second World War* 558 (1970).

<sup>12</sup>*Id.* at 677.

<sup>13</sup>Interview with Colonel Charles E. Cheever, (U.S. Army, retired), by Colonel Fred K. Green, at 42 (1983) (transcript retained by the Army Military History Institute) [hereinafter Cheever Interview].

<sup>14</sup>*Id.* at 52.

officer of the Judge Advocate General's Department as a member of a general courts-martial if reasonably available.<sup>15</sup> The lack of a requirement for trial and defense counsel to be lawyers perhaps was the reason for having so few judge advocates authorized for combat units. For example, an infantry division was authorized five people in its judge advocate section: two officers (a lieutenant colonel and captain), one warrant officer, and two enlisted soldiers.<sup>16</sup> One less officer was authorized for an armored division. A corps judge advocate office totaled five also: two officers (a colonel and lieutenant colonel), and three enlisted soldiers, including a stenographer and clerk typists. An army's office totaled thirteen: six officers, one warrant officer, and six enlisted soldiers. An army group had nine: four officers, one warrant officer, and four enlisted.

In addition to division, corps, and army headquarters, judge advocates supported base sections that were established in Britain and on the continent. For example, five base sections were established in Britain well before the invasion. The Advanced Base Section moved to the continent on June 16, 1944,<sup>17</sup> only ten days after D-Day. The Normandy Base Section and Brittany Base Section were established in August. Other base sections moved from Britain to the continent to establish the Paris and Channel Base Sections. Generally, base sections were given general courts-martial authority, and so, in addition to providing many other legal services, one of the primary functions of base section judge advocates was to process courts-martial.<sup>18</sup>

Despite the comparatively small number of judge advocate officers at each unit, the tasks given lawyers increased, not only in the area of military justice, but in other legal areas as well. A monthly report by the staff judge advocate, Third US. Army, typified the work normally done: try cases; prepare procedural guides; review courts-martial records and pretrial documents; advise on military affairs, rules of land warfare, and military government questions; advise summary court officers; prepare letters of reprimand and admonishments; prepare military justice circulars; distribute Law of Land Warfare pamphlets; investigate Law of War violations; review the legal sufficiency of numerous documents pertaining, e.g., to currency exchange and prisoners of war; investigate automobile accidents; and

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<sup>15</sup>Articles of War, art. 8, ch. 227, subch. II, 41 Stat. 787, 788 (1920); A Manual for Courts-Martial United States Army, 1928, was in effect during World War II.

<sup>16</sup>Study 82, *supra* note 6, at 40.

<sup>17</sup>*Id.* at 5.

<sup>18</sup>*Id.* at 10.

furnish legal assistance.<sup>19</sup> Accordingly, law office strengths were augmented both with non-Judge Advocate General's Department (JAGD) lawyers and with personnel assigned directly to JAGD. To illustrate the increase in the number of assigned lawyers, the legal section of the First Army Group, which was redesignated 12th Army Group in August 1944, rose from an original three officers, one warrant officer, and four enlisted men in November 1943 to forty-seven officers and seventy-eight enlisted soldiers.<sup>20</sup> Similarly, strengths of other judge advocate sections increased to deal with the many legal issues confronted.

### ***C. MILITARY JUSTICE ISSUES***

The need for judge advocate support in the forward echelons of the invasion quickly became apparent. For example, within thirty days of the arrival of the First U.S. Army in France, thirty-five court-martial charges had been preferred and examined by judge advocates.<sup>21</sup> Ultimately, from July 18, 1942 until May 1, 1945, which included the period spent in Great Britain, 12,120 general courts-martial cases were reported in the European Theater of Operations.<sup>22</sup> Over 1000 of these were officer cases. In addition, about 32,360 special courts-martial and about 64,420 summary courts-martial were conducted. The most frequent offenses tried by general courts-martial included: 3,857 for absence without leave; 1,963 desertion convictions; 1,608 assault cases; 1,424 disobedience cases; 1,191 larceny cases; 935 sentinel cases; 494 misbehavior before the enemy cases; 305 involuntary manslaughter cases; 290 murder cases; 169 rape cases; and 87 statutory rape cases.<sup>23</sup>

While no attempt will be made to address all the problems associated with military justice actions in the European Theater, we can identify several issues unique to combat situations.

#### *1. Case Pending at Deployment.*

Immediately before D-Day, many combat organizations had charges pending that were impractical to try. Equipment often was packed

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<sup>19</sup>Third U.S. Army, After Action Report, Judge Advocate Section at 4 (undated) [hereinafter Third Army Report].

<sup>20</sup>Report of Operations (Final After Action Report), 12th Army Group, Judge Advocate Section at 25 (undated) [hereinafter 12th Group Report].

<sup>21</sup>Report of Operations, Headquarters First U.S. Army, for period 20 Oct 43–1 Aug 44, Judge Advocate Section at 227 (undated) [hereinafter First Army Report].

<sup>22</sup>Report of the General Board, United States Forces, European Theater, Military Justice Administration in the Theater of Operations 1 (General Order 128, dated 17 June 1945) (retained by the Army Military History Institute) [hereinafter Study 831]. By comparison, the number of American soldiers serving in the Theater was about 4,182,000.

<sup>23</sup>*Id.* at 3–23.

away, and officers were needed for other urgent duties. Pending cases, therefore, often were transferred to base section jurisdictions remaining in Britain. The Western Base Section, for example, tried sixty-three cases in the forty-five days after D Day.<sup>24</sup>

## 2. *Concurrent Jurisdiction of Base Sections.*

In addition to the transfer of cases to base sections in Britain, with the rapid movement of combat organizations through France, combat commanders frequently transferred cases to established base sections on the continent. This procedure was particularly useful when the offenses involved civilian witnesses.<sup>25</sup> Transferring cases had one severe disadvantage, however. Because of rapid movement and overburdened communications, it frequently was not possible to obtain records of an accused to be used during the sentencing proceeding.

Another issue regarding base section jurisdiction caused consternation among some commanders and judge advocates. Beginning in December 1944, it became a European Theater policy that base section commanders could exercise court-martial jurisdiction over soldiers committing offenses within the base section geographical limits.<sup>26</sup> This often included soldiers under the jurisdiction of another commander. While transfer of cases between convening authorities generally was recognized as necessary for the efficient administration of justice, concurrent jurisdiction, which balanced the discipline needs of the geographic commander with that of the command line commander, caused concern. Sometimes this dilemma was resolved by limiting the unilateral jurisdiction of the geographic commander to nonjudicial punishment.<sup>27</sup> In other cases, exercise of summary court-martial jurisdiction without the consent of the accused's commander occurred. This was true especially for minor offenses. In Paris, for example, for traffic offenses, the base section commander imposed seventy to one hundred summary court trials daily, using the authority of the European Theater policy.<sup>28</sup> To provide swift discipline, these "police courts" or "on-the-spot" summary courts became widely used.

## 3. *Desertion.*

Desertion is a capital offense during war, and in World War II the death sentence was imposed for desertion in 139 cases. That sentence

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<sup>24</sup>*Id.* at 50.

<sup>25</sup>*Id.* at 5.

<sup>26</sup>Study 82, *supra* note 6, at 30.

<sup>27</sup>*Id.* at 31.

<sup>28</sup>*Id.*

was executed only once, in *United States v. Slovik*.<sup>29</sup> Nevertheless, two issues concerning this offense are worthy of note. First, before embarking for Normandy, judge advocates developed a procedure for warning unit members of the impending movement and the upcoming hazardous operations.<sup>30</sup> This was necessary to perfect evidence for trial. Second, prosecuting desertion offenses was frequently criticized by senior judge advocates as an example of overcharging. Often the evidence established only absence without leave.<sup>31</sup>

#### 4. *Speedy Trial.*

Even during combat operations, there was heavy emphasis on speedy trial. In fact, expeditious processing is probably even more important in combat situations, where witnesses may become battle casualties and where movement of units could make trials impossible if not held quickly. In the European Theater, a goal of thirty days to sentence and forty-five days to action was set and attained by many jurisdictions. The overall average, however, was thirty-eight days to sentence and sixty days to action.<sup>32</sup> While excessive emphasis on speedy processing was criticized by some judge advocates who favored more attention to proper investigation, securing evidence, and the rights of an accused,<sup>33</sup> these World War II goals illustrate the constant attention given to speedy processing of courts-martial.

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<sup>29</sup>CM ETO 5555 (B.R.-E.T.O. 1945); see Study 83, *supra* note 22, at 4; J. DiMona, Great Court-Martial Cases 116-29 (1972). See generally 12th Group Report, *supra* note 20, at 41 and Appendix I. See also II TJAG Branch History *supra* note 7, at 197.

<sup>30</sup>First Army Report, *supra* note 21, at 230.

<sup>31</sup>*Id.* at 231.

<sup>32</sup>Study 82, *supra* note 6, at 33.

<sup>33</sup>Some protections were afforded convicted servicemembers by the Board of Review established in the European Theater to consider cases pursuant to Article of War 50 1/2. From July 18, 1942 through February 15, 1946, the board reviewed 19,401 general courts-martial records involving 22,214 individuals. Including acquittals and cases disapproved by convening authorities, the sentences of death, dismissal, or dishonorable discharges were approved for only 16,987 individuals, or about 76.5 percent of those convicted. I TJAG Branch History, *supra* note 7, at 3. Of these, the reviewing authority suspended sentences for 11,813 and immediately restored 1109 to duty. *Id.* *United States v. Woods*, one of the cases considered by the Board of Review, illustrates the dichotomy between combat operations and the rights of an accused. Charged with misbehavior before the enemy on October 5, 1944, the charges were preferred on October 11. A psychiatric exam was completed on October 13, and a pretrial investigation was finished on October 16. The case was referred on October 17 and tried that day. In a 50-minute trial, the accused received a dishonorable discharge, total forfeitures, and 10 years' confinement. The court consisted of two captains, one first lieutenant, and two second lieutenants. One of the latter was the law member. The evidence against the accused was a morning report and a stipulation that the accused's unit was before the enemy as a regimental reserve. The accused testified that he was not before the enemy. The Board of Review overturned the conviction on due process grounds: neither the accused nor counsel had sufficient time to prepare for trial, and the defense counsel had improperly offered a stipulation in a capital case. *Id.* at 113-14.

### 5. *Location of Judge Advocate Sections and Trials.*

As discussed earlier, base section jurisdictions afforded combat commanders the options of transferring accused soldiers to geographically convenient trial locations. Still, trials occurred in combat units, and judge advocate sections had to be positioned not only to support trials but also to provide other legal services. Two observations offer general guidance on placement of judge advocate assets. The staff judge advocate section should accompany the forward echelon of any major deployment.<sup>34</sup> This was verified by the volume of cases occurring shortly after landing in France. If, during combat, the judge advocate section operates from a rear echelon, that location must be near enough to the front line units to permit communications about legal matters.<sup>35</sup> In the European Theater, the distance between the rear and forward echelons often was ten to fifteen miles.<sup>36</sup> Problems arose when the staff judge advocate in the rear echelon was so far behind the units that commanders had to make long trips to the rear in connection with legal activities, as happened in Patton's Third U.S. Army, for example.<sup>37</sup> In both the First and Fifteenth Armies, it appeared preferable to hold trials in rear areas, where court members could be appointed for longer periods.<sup>38</sup> On occasion, however, judge advocates would bring counsel and the accused to a forward area for trial, perhaps for the convenience of witnesses and court members. Because the situation and the desires of the commander may vary, the Report of the General Board concluded that no rigid rule on placement of the Judge Advocate Section be prescribed.<sup>39</sup>

### 6. *Psychiatric Evaluations.*

For combat offenses, such as desertion and misbehavior before the enemy, it became the policy of the First U.S. Army to have an accused examined by a psychiatrist.<sup>40</sup> The First U.S. Army Exhaustion Center

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For a very interesting review of substantive problems considered by the Board of Review, see II TJAG Branch History, *supra* note 7.

<sup>34</sup>First Army Report, *supra* note 21, at 227. Present Judge Advocate General's Corps doctrine emphasizes that lawyers must provide legal services as far forward as possible. See U.S. Army Training & Doctrine Command, Pamphlet No. 525-52, para. 4e(2) (21 Mar. 1986) [hereinafter TRADOC Pam. 525-52].

<sup>35</sup>Study 82, *supra* note 6, at 28-29. In addition to military justice matters, commanders frequently will encounter operational law, law of war, and claims issues. Judge advocate assets must be deployed far enough forward to respond to these issues.

<sup>36</sup>*Id.* at 29.

<sup>37</sup>Third Army Report, *supra* note 19, at 8.

<sup>38</sup>Final After-Action Report, Judge Advocate Section, Fifteenth U.S. Army at 9 (15 Sept. 45) [hereinafter Fifteenth Army Report]; First Army Report, *supra* note 21, at 234.

<sup>39</sup>Study 82, *supra* note 7, at 29.

<sup>40</sup>12th Group Report, *supra* note 20, at 26.



was established and operated under the supervision of the army group surgeon. While in most commands psychiatric examinations were made only if the nature of the case or history of the accused suggested it,<sup>41</sup> the 12th Army Group extended the policy of requiring psychiatric exams for combat offenses to the Third, Ninth, and Fifteenth U.S. Armies.<sup>42</sup> In addition, in Fifteenth U.S. Army, every individual tried by general court-martial received a psychiatric examination.<sup>43</sup>

### 7. *Classification of Charge Sheets and Records of Trial.*

The security classification of trial documents can be a serious concern during war. European Theater Standard Operation Procedures for Military Justice required classification of charge sheets that contained either the geographic location of the station or the organization of the accused.<sup>44</sup> Similarly, classification of portions of records of trial were required.<sup>45</sup> Classification requirements caused development of systems to secure classified documents and to expunge irrelevant classified information from the record of trial distributed to the accused.

### 8. *Investigations.*

Investigation of offenses generally was conducted informally by an officer from the accused's unit. In more serious cases, the Criminal Investigation Department (CID) was used.<sup>46</sup> Judge advocates perennially complained that investigations were completed and forwarded to commanders too slowly. One particularly successful staff judge advocate improved speedy processing of cases by giving the CID a desk in the judge advocate's office.<sup>47</sup> A number of judge advocates believed that CID teams should operate under the supervision of the staff judge advocate.<sup>48</sup>

### 9. *Confinement Policies.*

Due to the circumstances of war and the lack of facilities, several general policies existed in the European Theater limiting confinement. Notably, confinement was to be avoided unless absolutely ne-

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<sup>41</sup>Study 83, *supra* note 22, at 30.

<sup>42</sup>12th Group Report, *supra* note 20, at 26.

<sup>43</sup>Fifteenth Army Report, *supra* note 38, at 6-7.

<sup>44</sup>12th Group Report, *supra* note 20, at 40.

<sup>45</sup>Study 83, *supra* note 22, at 28.

<sup>46</sup>*Id.*

<sup>47</sup>Interview with Major General Kenneth J. Hodson, U.S. Army Retired, by Lieutenant Colonel Robert C. Boyer, at 32 (17 Mar. 1982) (retained in Army Military History Institute Library) [hereinafter Hodson Interview].

<sup>48</sup>Study 83, *supra* note 22, at 28.

cesssary.<sup>49</sup> This policy applied not only to convicted prisoners, but also to those awaiting trial. Only limited confinement facilities were available, and responsibility for a confined accused rested with the unit commander, who usually had no facility for confinement.<sup>50</sup> Commanders were directed to suspend confinement in all but extreme cases.<sup>51</sup>

It was also a policy that offenders should not avoid combat.<sup>52</sup> This policy apparently existed to dissuade servicemen from committing petty offenses to avoid going to the front. Perhaps as a result of this “no confinement” policy, the majority of soldiers sentenced by inferior courts received forfeitures and no confinement.<sup>53</sup> Because of this, some soldiers often would have more than one forfeiture in effect at the same time.

Sentences in general courts-martial were relatively severe. “It was standard practice in some commands to impose the maximum prison sentence established by the Table of Maximum Punishments.”” These harsh sentences were given to enforce discipline and to deter crime, and were often due to the callous attitude of permanent court members used in some commands.<sup>55</sup> In any event, as the theater matured and stockades were constructed, policies changed to allow prisoners with sentences from four to six months to be held in base section guardhouses.<sup>56</sup> Rehabilitation and clemency procedures returned some prisoners to their units. Those with longer sentences were returned to the United States to serve confinement.<sup>57</sup>

## ***D. MILITARY COMMISSIONS***

In July 1944, the 12th **U.S.** Army Group requested that the theater commander authorize the appointment of military commissions with jurisdiction in cases affecting the security or efficiency of the combat forces.<sup>58</sup> This request was approved, and in October the 12th Army Group published a regulation on military commissions.<sup>59</sup> Although military commissions were mentioned in a number of Articles of War,

<sup>49</sup>Report of the General Board, United States Forces European Theater, Military Offenders in the Theater of Operations 17 (General Order 128, dated 17 June 45) (retained by the Army Military History Institute) [hereinafter Study 84].

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 18.

<sup>54</sup>*Id.* at 19.

<sup>55</sup>*Id.*; Study 83, *supra* note 22, at 46.

<sup>56</sup>Study 84, *supra* note 49, at 22; 12th Group Report, *supra* note 20, at 28, 127.

<sup>57</sup>Study 84, *supra* note 49, at 22; 12th Group Report, *supra* note 20, at 28, 127.

<sup>58</sup>12th Group Report, *supra* note 20, at 30.

<sup>59</sup>*Id.* at 147.

their jurisdiction, composition, and procedure were not regulated by statute.<sup>60</sup> Consequently, only the guidance contained in an Army field manual, and directives from the theater army and subordinate commanders governed these commissions.

Generally, army group commanders, and later, army commanders, were authorized to appoint military commissions for the trial of persons not subject to U.S. military law who were charged with espionage or with violations of the law of war that threatened or impaired the security or effectiveness of U.S. Forces. In accordance with established procedures, commissions comprised not less than three officers, with a trial and defense counsel; the commissions could make their own rules of procedure and were not bound by evidentiary rules for courts-martial; and they could impose sentences in excess of those authorized in the Manual for Courts-Martial.<sup>61</sup> Theater command policy and 12th Army Group regulations imposed certain requirements, such as review of the record and approval of certain sentences by the army commander, or any senior commander.<sup>62</sup> To avoid reprisals against Allied prisoners of war, war criminals not charged with espionage or some other threat to U.S. Forces were not tried during hostilities. Also, when army commanders were delegated authority to appoint commissions, jurisdiction was withheld over certain individuals in areas previously occupied by Germany and over offenses occurring in Germany unless committed prior to establishment of military governments there.<sup>63</sup>

From September 1944 until May 8, 1945, thirteen cases involving twenty-nine people were tried by military commissions.<sup>64</sup> All of these individuals were charged as spies except one, who was tried for the murder of two American prisoners of war. In the 12th Army Group, thirty-eight people were tried by military commissions. Of these, thirty-five were sentenced to death, three were acquitted, three death sentences were commuted to life, and thirty-two were executed by hanging or shooting.<sup>65</sup> No death sentence was executed until December 1944. Then "in view of the necessity for expeditious trials and prompt execution of Germans guilty of battlefield offenses during the Ardennes campaign, Army commanders were authorized to execute any death sentence imposed. . . unless confirmation was expressly required by the Army Group or Theater Commander."<sup>66</sup> While there

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<sup>60</sup>*Id.*; Study 83, *supra* note 22, at 47.

<sup>61</sup>Study 83, *supra* note 22, at 47–48.

<sup>62</sup>*Id.*; 12th Group Report, *supra* note 20, at 149.

<sup>63</sup>*Id.*

<sup>64</sup>Study 83, *supra* note 22, at 49.

<sup>65</sup>12th Group Report, *supra* note 20, at 30.

<sup>66</sup>*Id.*

was a paucity of precedent for military commissions in the field, the 12th Army Group After-Action Report praised the procedures established in that command, attributing increased battlefield confidence, safety, and security for the soldiers to the swift, effective justice provided.<sup>67</sup>

Despite this praise, however, the lack of information and training about military commissions before World War II is apparent from the many conferences that judge advocates conducted to discuss problems associated with them.<sup>68</sup> The confusion about the responsibility for military commissions is also illustrated by the differing treatment in after-action studies. The General Board covers them under military justice administration,<sup>69</sup> while the 12th Army Group considers them to be an international law function.<sup>70</sup> Such confusion has not been clarified today. No substantive material on the topic of military commissions is contained in either the criminal or the international law portions of current Operation Law Instruction at The Judge Advocate General's School.<sup>71</sup> Responsibility for military commission legal advice similarly has been omitted from the current *US Army Operational Concept for Providing Legal Services in Theaters of Operations*.<sup>72</sup> Needless to say, evaluation of the feasibility of military commissions and their rules of procedure is needed.

## ***E. WAR CRIMES INVESTIGATIONS AND PROCEEDINGS***

Much has been written about war crimes during World War II.<sup>73</sup> Nevertheless, to be prepared to investigate and try war crimes in the future, commanders and judge advocates must understand the magnitude of the task undertaken in World War II and have some familiarity with the problems encountered.

### ***1. Enemy Offenses.***

In planning for D-Day, judge advocates considered how to prosecute war criminals, but no specific plans were made.<sup>74</sup> By August 1944,

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<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>Study 83, *supra* note 22, at 47.

<sup>70</sup>12th Group Report, *supra* note 20, at 29.

<sup>71</sup>See The Judge Advocate General's School, Publication No. ADI-15, Operational Law Deskbook (Dec. 1987).

<sup>72</sup>TRADOC Pam 525-52.

<sup>73</sup>See War Crimes, War Criminals, and War Crimes Trials, An Annotated Bibliography and Source Book (N. Tutrow ed. 1986).

<sup>74</sup>12th Group Report, *supra* note 20, at 31; Fifteenth Army Report, *supra* note 38, at 18-19.

however, reports of summary executions of American prisoners became so numerous that the theater commander established a court of inquiry to investigate war crimes.<sup>75</sup> This began what was later called the preliminary stage of four stages of investigation, apprehension, and prosecution of war criminals.<sup>76</sup> Overall, nearly 4,000 cases were opened, and almost 500 war crime trials were held involving over 1,600 defendants.<sup>77</sup> In the 12th Army Group, for example, over 1,500 separate reports of investigation took the time of 325 members of that command.<sup>78</sup>

The preliminary phase, as described in the Report of the Deputy Judge Advocate for War Crimes, lasted roughly from early July until December 1944.<sup>79</sup> This period was marked by initial directives requiring investigation of war crimes by subordinate commands. The "first phase," which lasted from January to about July 1945, emphasized decentralized collection of evidence and apprehension of suspects. At this time, the magnitude of the war crimes problem was not fully recognized.<sup>80</sup> The second phase began after the Allied victory, and lasted until July 1946. Investigations and trials during this phase remained decentralized with the Armies of Occupation.<sup>81</sup> During the third phase, which lasted until June 1948, the operational responsibility for the entire war crimes project was centralized in the Theater headquarters under the Deputy Judge Advocate for War Crimes.

During the preliminary phase it was planned that investigative agencies from subordinate commands, such as the intelligence staff (G2), provost marshal, and inspectors general, would perform investigations.<sup>82</sup> The Court of Inquiry came under the Theater Assistant Chief of Staff, G1, and a War Crimes Branch was established in the Theater Judge Advocate Section.<sup>83</sup> Theater and army group directives were published that identified offenses that were war crimes and listed information to be reported.<sup>84</sup> Checklists for investigating offi-

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<sup>75</sup> 12th Group Report, *supra* note 20, at 31; Fifteenth Army Report, *supra* note 38, at 18-19; Report of the General Board, United States Forces, European Theater, War Crimes and Punishment of War Criminals 7 (General Order 128, 17 June 45) (retained by the Army Military History Institute) [hereinafter Study 86].

<sup>76</sup> United States Army, Report of the Deputy Judge Advocate for War Crimes, European Command June 1944 to July 1948, at 3 (retained in the Army Library, Pentagon, Washington, D.C.) [hereinafter DJA Report].

<sup>77</sup> *Id.* at 160.

<sup>78</sup> 12th Group Report, *supra* note 20, at 32.

<sup>79</sup> DJA Report, *supra* note 76, at 3.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 17.

<sup>82</sup> *Id.* at 14; Study 86, *supra* note 75, at 7.

<sup>83</sup> DJA Report, *supra* note 76, at 14; Study 86, *supra* note 75, at 7; 12th Group Report, *supra* note 20, at 157.

cers were developed.<sup>85</sup> Reports were forwarded to the theater headquarters for consideration by the Board of Inquiry. Reports became so numerous, however, that only the most flagrant cases were considered by the Board.<sup>86</sup> Procedures then were developed so that, once identified, names of suspected violators were put on Wanted Lists, which were forwarded to the commands for apprehension.<sup>87</sup> These lists also were circulated to the Allies, and procedures evolved to exchange information and permit prosecution of cases by the Ally whose nationals were victims of the war crime alleged. The task of apprehending suspects was enormous, and apprehended suspects were treated as prisoners of war. Due to concern about reprisals, the usual policy was to delay trials until after cessation of hostilities in Germany.<sup>88</sup> In addition, the judge advocate sections published War Crime Bulletins describing the atrocities of the Germans against U.S. prisoners. ~ ~ ~

During its first phase, the war crimes effort became more focused, but investigations still were very decentralized. Staffing, equipping, and training for the Theater Army War Crimes Group and investigating teams were problems because of insufficient qualified personnel and equipment.<sup>90</sup> Army groups were directed to establish war crimes branches in their judge advocate sections to be under the supervision of the Theater War Crimes Group.<sup>91</sup> Initially located in Paris, the Group moved to Wiesbaden, Germany, near the end of the first phase to be close to field war crime agencies.<sup>92</sup> By the end of the first phase, seven war crimes investigating teams were organized of the nineteen that were planned for 12th Army Group, 6th Army Group, Base Section Headquarters, and the Theater Army.<sup>93</sup>

Phases two and three were marked by increased centralization of the war crimes effort. Personnel from army group war crimes investigating teams were transferred to the Theater Army War Crimes Branch, which moved to Augsburg and finally to Munich to be close

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<sup>85</sup> 12th Group Report, *supra* note 20, at 173.

<sup>86</sup> DJA Report, *supra* note 76, at 15.

<sup>87</sup> *Id.* The magnitude of the apprehension problem was enormous. At one time the list of subjects numbered over 150,000. Study 86, *supra* note 75, at 89.

<sup>88</sup> DJA Report, *supra* note 76, at 16.

<sup>89</sup> 12th Group Report, *supra* note 20, at 33, 175.

<sup>90</sup> DJA Report, *supra* note 76, at 5. For example, ideally a war crimes investigating team included two lawyers, a pathologist, a forensic evidence expert, a recorder, a court reporter, a stenographer, a photographer, an interpreter, and two drivers. In the winter of 1944–45 there were but five pathologists in the theater, and there were an inadequate number of court reporters to cover even court-martial trials. Study 86, *supra* note 75, at 8; see also Fifteenth Army Report, *supra* note 38, at 18–19.

<sup>91</sup> Fifteenth Army Report, *supra* note 38, at 18.

<sup>92</sup> *Id.* at 5, 6.

<sup>93</sup> *Id.* at 5, 21.

to the centralized detention and trial facility at Dachau.<sup>94</sup> Most trials occurred during these two stages. Except for the few cases tried by military commission and those tried by the International Military Tribunal, Neurenberg, cases were tried by military government courts.<sup>95</sup> These courts were convened in phase two by the Third or Seventh Army commanders and in phase three by the Theater commander.<sup>96</sup> Trial procedures were established in a manual prepared by the Deputy Judge Advocate for War Crimes, European Theater.<sup>97</sup>

In a report that provided a historical summary of the problems encountered in war crimes investigation and prosecution, the Deputy Judge Advocate made several observations and recommendations. Perhaps most important, the report stressed the need for prompt investigation, collection of evidence, and apprehension of perpetrators. "Witnesses must be interrogated and perpetrators must be apprehended and detained before they are scattered."<sup>98</sup> In addition, the report stressed the need for centralized control of efforts to investigate and detain war criminals as well as a centralized effort to exchange and disseminate information in international channels.<sup>99</sup> The report concluded that it was futile to expect personnel in subordinate organizations with important wartime missions, such as the provost marshal (who had prisoners of war responsibility), to effectively support the war crimes prosecution effort.<sup>100</sup> As nonlawyer investigators simply did not understand the evidentiary implications of gathering information, the report also concluded that "experienced lawyer investigators must follow close behind the advancing armies in such numbers to assure prompt development of cases."<sup>101</sup> Finally, the report recommended organizing and staffing a Judge Advocate War Crimes Unit in each theater, with responsibility for all aspects of the war crimes mission.<sup>102</sup>

## 2. *Friendly Offenses.*

While most of the war crimes effort dealt with offenses committed by the enemy, the conduct of American soldiers was not always beyond reproach. Upon entry of United States forces into Germany, for example, there was a spiral of offenses, such as rape of civilians and

<sup>94</sup>*Id.* at 7, 10, 11.

<sup>95</sup>*Id.* at 46, 52.

<sup>96</sup>*Id.* at 46.

<sup>97</sup>*Id.* at 165.

<sup>98</sup>*Id.* at 79; *see also* Study 86, *supra* note 75, at 17.

<sup>99</sup>Fifteenth Army Report, *supra* note 38, at 79.

<sup>100</sup>*Id.* at 80.

<sup>101</sup>*Id.* at 79–80. The General Board reached the same conclusion. *See* Study 86, *supra* note 75, at 11–12.

<sup>102</sup>Fifteenth Army Report, *supra* note 38, at 81.

looting, and there were substantial allegations of prisoner mistreatment and executions.<sup>103</sup> These were, however, individual offenses, without the systemic criminality practiced by certain Nazi groups. The probable explanation of some of these offenses was an “inadequate understanding [by United States soldiers] of the obligation towards prisoners of war and civilian populations of occupied country.”<sup>104</sup>

## **F. CIVIL AFFAIRS, MILITARY GOVERNMENTS, AND INTERNATIONAL LAW**

Civil affairs pertains to liaison with civilian governments in areas where armed forces are located, but have not assumed supreme authority. World War II examples include the friendly countries of France and Belgium, which were liberated during World War II.<sup>105</sup> “Military Government” refers to the governments established under military authority of occupation, such as occurred in Germany.<sup>106</sup>

During World War II, civil affairs and military government matters were a primary responsibility of the Assistant Chief of Staff, G5. This responsibility included matters requiring advice on various legal issues. Consequently, about 200 specially trained and highly qualified non-JAGD lawyers were assigned to civil affairs and military government duties.<sup>107</sup>

Even though responsibility for civil affairs and military government advice usually rested with G5 sections, there were headquarters where the commanding general had the staff judge advocate perform these functions. For example, in the 12th Army Group the international law section of the staff judge advocate office was charged with advising on questions pertaining to military government and administration of martial law.<sup>108</sup> Similarly, in the Fifteenth Army, which had occupation responsibility of the Rheinprovinz Military District in Germany, the staff judge advocate was responsible for reviewing military government cases and handling legal matters pertaining to the military government.<sup>109</sup> Unique issues they considered are discussed below.

<sup>103</sup> Study 86, *supra* note 75, at 6; see also D. Irving, *The War Between the Generals* 214-17 (1981); Robert J. Berens, *Battle Atrocities*, *Army*, April 1986, at 43-56.

<sup>104</sup> Study 86, *supra* note 75, at 6.

<sup>105</sup> Report of the General Board, United States Forces, European Theater, Legal Phases of Civil Affairs and Military Government 1 (General Order 128, 17 June 45) (retained by the Army Military History Institute Library) [hereinafter Study 85].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2; see also Study 82, *supra* note 6, at 14.

<sup>108</sup> 12th Group Report, *supra* note 20, at 31.

<sup>109</sup> Fifteenth Army Report, *supra* note 38, at 3.



### 1. *Civil Affairs.*

In countries liberated from German occupation, the Supreme Commander did not legislate, and no military courts were established.<sup>110</sup> Upon entering France, a formal notice was prepared directing obedience of the civilian population to orders of the Allied commanders, but this notice was only necessary because of the breakdown of French civil authority.<sup>111</sup> The Supreme Commander reserved power in cases of military necessity to try civilians in military courts, but this was never necessary.<sup>112</sup> In fact, there was a great deal of cooperation between civil authorities and Allied commanders. Local liberated government officials often legislated by decree or executive order to accommodate the interests of Allied commanders.<sup>113</sup> Local authorities frequently dealt with issues affecting property interests of the allies, such as illegal receipt by local nationals of gasoline, war materials, and arms or ammunition.<sup>114</sup> French military courts were constituted as early as June 16, 1944; they tried several cases of treason, espionage, and looting by civilians soon after the Normandy landing.<sup>115</sup> Similarly, in Belgium, Holland, and Luxembourg local authorities tried cases of blackmarketing and pillaging, although there were sometimes Allied complaints that sentences were too mild.<sup>116</sup>

Several troublesome issues in liberated territory related to the right of the Allied forces to retain and dispose of captured war material. Questions arose, for example, about the nature of what appeared to be French-owned property acquired by the Germans and then recaptured by the Allies. Eventually, a directive issued by the Supreme Headquarters categorized material and clarified disposition instructions.

### 2. *Military Governments.*

Legislation of the Supreme Allied Commander included a proclamation, and ordinances, laws, and notices, the latter of which were authorized to be published by subordinate commanders.<sup>118</sup> The proclamation, which was required to be posted upon occupation of German territory, established a military government and vested supreme legislative, judicial, and executive authority and power in the Su-

<sup>110</sup>Study 85, *supra* note 105, at 4-5

<sup>111</sup>*Id.* at 4.

<sup>112</sup>*Id.* at 5.

<sup>113</sup>*Id.* at 7.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at 9-10.

<sup>117</sup>*Id.* at 12.

<sup>118</sup>*Id.* at 17.

preme Commander.<sup>119</sup> Ordinances defined nineteen specific crimes punishable by death and established military government courts.<sup>120</sup> Numerous laws were legislated that abrogated Nazi law, abolished Nazi courts, dissolved the Nazi party, provided for the authority of the military government, established a property control law, and imposed censorship upon all communications.<sup>121</sup> Notices by local commanders usually merely implemented legislation of the Supreme Commander.<sup>122</sup>

One particularly troublesome legislative issue concerned fraternization. Under a nonfraternization policy established by the Supreme Commander in September 1944, American military personnel could not speak to Germans except in the course of official business.<sup>123</sup> Subordinate commanders found this policy exceptionally difficult to enforce, so some division commanders published notices prohibiting German civilians from speaking with American military personnel.<sup>124</sup> These notices often held parents responsible for their children's actions. Eventually, the Supreme Commander clarified the nonfraternization policy as a restriction on soldiers only, not to be enforced against civilians.<sup>125</sup>

Administering military governments involved not only the legislation of the Supreme Commander but also the rules of international law. Thus, legal personnel were involved with interpreting military government legislation as well as international legal principles. They gave advice on such topics as the rights of residents in liberated territories to personal property located in occupied territory, rights of displaced persons, legality of payments promised by the United States to German families, disposition of political prisoners held in concentration camps, validity of claims of German nationals against the Nazi government, employment of German citizens, disposition of captured property, improper use of German prisoners to clear mine fields, and the legislative authority of the Supreme Commander.<sup>126</sup>

Military government courts had jurisdiction over all persons in occupied territory, except soldiers serving under the Supreme Commander or other allied nations, and prisoners of war.<sup>127</sup> There were

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<sup>119</sup>*Id.* at 18.

<sup>120</sup>*Id.* at 19.

<sup>121</sup>*Id.* at 19-22.

<sup>122</sup>*Id.* at 23.

<sup>123</sup>*Id.*

<sup>124</sup>*Id.*

<sup>125</sup>*Id.* at 24; see also Study 83, *supra* note 22, at 13.

<sup>126</sup>12th Group Report, *supra* note 20, at 31; Fifteenth Army Report, *supra* note 38, at 12-14.

<sup>127</sup>Study 85, *supra* note 105, at 25; First Army Report, *supra* note 21, at 238.

three types of courts: general, intermediate, and summary. These were distinguishable primarily by composition and punishment authority. General courts comprised not less than three members, one of whom was required to be a lawyer. General courts could impose any lawful sentence, including death.<sup>128</sup> A single officer could sit as an intermediate or summary court, but intermediate courts often had two or three officers, one of whom was a lawyer.<sup>129</sup> Summary courts were to have a lawyer when practicable, but use of lawyers was unusual.<sup>130</sup> The sentence limitation of intermediate courts was imprisonment for ten years and a fine of \$10,000; for a summary court it was one year and \$1,000.<sup>131</sup> Rules of procedure ensured certain rights for an accused, such as cross-examination of witnesses and consultation with a lawyer.<sup>132</sup> Review of cases was mandatory if the sentence exceeded one year's imprisonment or a fine of \$1,000. Final review usually was required by an army commander.<sup>133</sup>

Between September 18, 1944 and May 8, 1945 more than 16,000 cases involving 20,000 persons were tried by military government courts.<sup>134</sup> More than ninety-nine percent of these were by summary courts, and about seventy percent of these were for curfew or circulation violations.<sup>135</sup> Other cases involved looting, espionage, possession or use of firearms, making false statements, larceny, and assault.<sup>136</sup>

After reviewing the legal phases of civil affairs and military government operations during World War II, the Report of the General Board made several notable recommendations. First, the Board favored assignment of civil affairs and military government legal duties to the judge advocate section.<sup>137</sup> It saw no good reason why civil affairs staff sections should have different legal advisors than commanders and other staff sections. Similarly, it was the nearly universal view of senior judge advocates that legal advice for the G5 should be under the supervision of the staff judge advocate.<sup>138</sup> Next, the Board considered it impracticable to require lawyers, who were relatively few in number, to serve on military government courts, especially sum-

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<sup>128</sup>Study 85, *supra* note 105, at 25, 28.

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*Id.* at 28-29; *see also* First Army Report, *supra* note 21, at 238.

<sup>133</sup>*Id.* at 30.

<sup>134</sup>*Id.* at 32.

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*Id.* at 45.

<sup>138</sup>*Id.* at 49.

mary courts.<sup>139</sup> Finally, the Board stated its disfavor with the anti-fraternization policy and referred to the failure of a prior such policy to obtain practical results in World War I.<sup>140</sup> The Board stated: "We learn from history that we do not learn from history,"<sup>141</sup> and suggested that an alternative method be found to facilitate security of United States Forces.

### 3. *International Law.*

In addition to civil affairs and military government questions, many legal questions dealt with application and interpretation of rules of land warfare. In anticipation of such issues and to help soldiers in the field deal with such concerns, the Staff Judge Advocate, Third United States Army, prepared and distributed over **35,000** copies of a pocket-sized pamphlet entitled *Soldier's Handbook on the Rules of Land Warfare*.<sup>142</sup> Topics included division of enemy property, bombardment, treachery and quarter, ruses and stratagems, communications with the enemy, prisoners of war, military occupation, penalties for law of war violations, and treatment of the sick, wounded, and dead. Other issues judge advocates typically addressed included the legality of resuming combat operations by U.S. soldiers after capture by the enemy and recapture by the United States, use of the Red Cross emblem on vehicles and aircraft, the right to employ captured German medical personnel, and whether a detachable arm band was sufficient to afford protection as a lawful belligerent.<sup>143</sup> Similarly, there were many questions involving prisoners of war, including matters of employment and payment, responsibility for German soldiers left in the care of German civilian hospitals, the rights of prisoners being investigated for war crimes, and parole of prisoners.<sup>144</sup> Generally, detained enemy civilians received the full protection of the Geneva Convention; German Army deserters were treated as prisoners of war regardless of the desertion date; and prisoners of war, though not subject to compulsory manual tasks except when incident to operation of their camps, were compensated for work in their own camps.<sup>145</sup>

Senior judge advocates questioned by the General Board made several recommendations relevant to international law issues. These included that the rules of land warfare be changed to clarify the

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<sup>139</sup>*Id.* at 46.

<sup>140</sup>*Id.* at 47.

<sup>141</sup>*Id.*

<sup>142</sup>Third Army Report, *supra* note 19, at 1, 7.

<sup>143</sup>12th Group Report, *supra* note 20, at 29; Study 85, *supra* note 105, at 39.

<sup>144</sup>First Army Report, *supra* note 21, at 30.

<sup>145</sup>Study 85, *supra* note 105, at 40.

quantity of rations to be provided to prisoners of war; to specify procedures for handling Red Cross packages not deliverable to a specified address; and to clarify procedures for trial of offenses committed by prisoners of war after capture.<sup>146</sup> Other staff judge advocates recommended more thorough education about the laws of war, suggesting that even lawyers were ill-prepared to address many of the questions that arose. They suggested there should be "more intensive education of troops prior to combat to help avoid breaches of the laws and usages of war."<sup>147</sup>

## G. MILITARY AFFAIRS

Military Affairs sections of staff judge advocate offices advised on a wide variety of miscellaneous legal issues, including command and staff matters, legal assistance, and claims. While army group and army headquarters usually had a military affairs branch, separate legal assistance and claims branches were unusual.<sup>148</sup> Research material generally was available at higher headquarters, but this was not true of lower-level units and mobile commands, where there was a "definite lack of competent research facilities."<sup>149</sup> Complex issues, therefore, frequently were sent to higher headquarters for opinion. Information of current interest and value was disseminated by higher headquarters to subordinate units. For example, the Judge Advocate, 12th Army Group, distributed circulars periodically to all general court-martial jurisdictions within the command.<sup>150</sup> Advice given by military affairs lawyers included topics such as paying French civilian laborers, securing assets of deceased military personnel, retaining funds found in liberated territory, voting rights, marriage of military personnel in liberated and occupied territory, support of dependents, jurisdiction of civilian courts over military personnel, procurement of ranges in liberated territory, line of duty determinations, and military personnel law.<sup>151</sup> Several of the more frequently addressed issues and problems merit more explanation.

### 1. *Citizenship and Naturalization.*

Resident aliens inducted into the Armed Forces sometimes found themselves fighting against the country of their citizenship. If cap-

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<sup>146</sup>Study 86, *supra* note 75, at 14.

<sup>147</sup>*Id.* at 14, 15.

<sup>148</sup>*See* 12th Group Report, *supra* note 20, at 48; First Army Report, *supra* note 21, at 233; Third Army Report, *supra* note 19, at 1; 15th Army Report, *supra* note 38, at 1. Of these, only Third Army had a legal assistance branch. None had a separate claims branch.

<sup>149</sup>Study 87, *supra* note 1, at 37; Fifteenth Army Report, *supra* note 38, at 10.

<sup>150</sup>12th Group Report, *supra* note 20, at 29, 133-44.

<sup>151</sup>*Id.* at 28-29.

tured, these soldiers faced the possibility of trial for treason. To circumvent the long and laborious process for gaining United States citizenship, Congress passed the Second War Powers Act of 1942,<sup>152</sup> which simplified citizenship procedures for inducted resident aliens. Eventually, mobile naturalization teams using vice-consuls from the American embassy in Paris travelled throughout the combat area to naturalize resident alien soldiers.

Other troublesome citizenship problems arose regarding the status and rights of foreign nationals who married soldiers, and of illegitimate children. Because of conflicting views regarding their citizenship, judge advocates frequently found no relief agency available to assist inadequately supported foreign wives and illegitimate children.<sup>153</sup>

## 2. *Oaths and Acknowledgments.*

Because of the inadequacy of legal reference material, judge advocates often were unable to advise on the state requirements for proper execution of documents, such as deeds, affidavits, powers of attorney, and depositions.<sup>154</sup> Immediately after the war, it was expected that many of the documents prepared by Army lawyers would be contested.

## 3. *Effects of Deceased Persons.*

Handling the effects of deceased military personnel was covered under Article of War 112, which provided for appointment of a summary court to secure the soldier's effects and pay debts of the deceased. Problems arose over compliance with probate procedures of foreign governments. This often occurred in instances where soldiers had deposited funds in British banks. Negotiations with British authorities in 1942 established procedures whereby summary court officers could discharge their duties while still complying with the laws of Britain.<sup>155</sup> The ensuing directives by both United States and British officials were interpreted by legal advisors. These negotiations illustrate the value of anticipating issues and establishing procedures that deal with unique legal issues likely to occur during combat operations.

## 4. *Claims.*

Another example of anticipating combat contingencies arose in the claims area. During the early years of World War II United States

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<sup>152</sup>Ch. 199, § 1001, 56 Stat. 176, 182; *see* Study 87, *supra* note 1, at 4.

<sup>153</sup>Study 87, *supra* note 1, at 4.

<sup>154</sup>*Id.* at 5.

<sup>155</sup>*Id.* at 5–10.

officials studied the British claims system prior to sending American forces to Britain. It was thought that there would be many claims by British nationals arising out of acts or omissions of American soldiers. During the early phases of the War, responsibility for investigation under the British system was placed on unit commanders, who forwarded their findings to the British Claims Commission for approval.<sup>157</sup> This was similar to the system employed in the United States during peacetime. In combat, however, these procedures were expected to be unsatisfactory. British claims organizations were therefore expanded to relieve tactical commanders of any responsibility for processing claims, except for making a prompt preliminary report.<sup>158</sup> Permanent claims offices were established in area or base section commands. They had the primary duty of investigating and reporting claims to the British Claims Commission.<sup>159</sup>

After Congress passed the Foreign Claims Act in 1942,<sup>160</sup> the Secretary of War appointed a Claims Commission for the European Theater of Operations.<sup>161</sup> Eventually, U.S. claims officers were appointed and placed in British area claims offices. As a result, U.S. Forces adopted an area claims system similar to the British system. By 1943, the United States Claims Service became a separate staff section of the Commanding General, Service and Supply, European Theater of Operations. When planning for the invasion, the Claims Service anticipated the need to follow immediately behind the assault troops to preclude the accumulation of an insurmountable backlog of claims.<sup>162</sup> Consequently, claims teams were created to operate as independent units following behind combat units. Though many legal issues were addressed relating to the varied laws and procedures of foreign governments, the efficiency of the claims system was considered to have greatly promoted local national cooperation with military authorities.<sup>163</sup> One recommendation made by the General Board, however, was that field investigators be given authority to make on-the-spot settlements of small claims without the necessity of forwarding investigations to distant claims commissions for approval.<sup>164</sup>

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<sup>156</sup>*Id.* at 13.

<sup>157</sup>*Id.*

<sup>158</sup>*Id.*

<sup>159</sup>*Id.*

<sup>160</sup>Ch. 645, 55 Stat. 80 (1942).

<sup>161</sup>Study 87, *supra* note 1, at 14.

<sup>162</sup>*Id.* at 21, 22.

<sup>163</sup>*Id.* at 26.

<sup>164</sup>*Id.* at 47.

### 5. *Dependency, Domestic Relations, Wills, and Powers of Attorney.*

Legal assistance was one of the most extensive fields of legal service. What should be recalled is the extraordinary volume of actions and the many differences in laws considered. After World War II the General Board noted judge advocate recommendations to establish uniform laws, especially in the areas of wills, divorce, service of process, and **depositions**.<sup>166</sup> Two other recommendations were that a digest system be implemented to distribute changing rules to field judge advocates, such as in the area of dependency **regulations**,<sup>167</sup> and that more study be given during peacetime to handling of legal matters unique to war, such as distributing the estates of deceased soldiers.<sup>168</sup>

## 111. GRENADA OPERATIONS

The Grenada operation, *Urgent Fury*, represents the type of conflict that has a far greater probability of occurring than the conventional World War II scenario. The legal issues confronted in Grenada were remarkably similar to concerns faced during World War II, despite the short duration of the operation.

### A. OVERVIEW

United States military forces landed on Grenada on October 25, 1983 to protect the lives of U.S. medical students, to restore a democratic government, and to eradicate Cuban influence on the island.<sup>169</sup> Landing by air and sea at several locations throughout this 119 square mile Caribbean island, the total number of U.S. forces deployed reached a peak of seven battalions by October 28.<sup>170</sup> In all, nine combat battalions participated: one U.S. Marine Corps Battalion, two ranger battalions, and six battalions of the 82d Airborne Division, XVIII Airborne Corps. By October 28 all major military objectives had been achieved, and the ranger battalions had begun to **depart**.<sup>171</sup> Combat operations ended by November 2, and by mid-December all combat units had departed, although some military personnel remained for peacekeeping activities.

<sup>166</sup> Fifteenth Army Report, *supra* note 38, at 10.

<sup>167</sup> Study 87, *supra* note 1, at 48, 50.

<sup>168</sup> *Id.* at 48.

<sup>169</sup> *Id.* at 49.

<sup>170</sup> Bolger, *Operation Urgent Fury and Its Critics*, Mil. Rev., July 1986, at 58.

<sup>171</sup> *Id.* at 61-62.

<sup>172</sup> Cragg, *Operation "Urgent Fury": The U.S. Army in Grenada*, Army, Dec. 1983, at 29.



During this relatively short operation, military forces assaulted and secured operational objectives such as airfields, enemy facilities, and medical complexes where students were housed.<sup>172</sup> Overall, nearly 600 medical students were evacuated, over 600 Cuban and Grenadian People's Revolution Army personnel were captured, and nearly 300 U.S., Cuban, and Grenadians were killed, wounded, or injured.<sup>173</sup>

## B. JUDGE ADVOCATE ORGANIZATION

While there were a number of legal issues involved in the decision to deploy U.S. forces to Grenada, the focus in this article will be on judge advocate services provided in support of the combat operation.<sup>174</sup>

Even though an initial operational mission passed from XVIII Airborne Corps to the 82d Airborne Division on October 22, the first formal judge advocate involvement began on the morning of October 23, when the corps deputy staff judge advocate was ordered to report to corps headquarters for an urgent meeting.<sup>175</sup> On the next day, the corps staff judge advocate informally briefed the Staff Judge Advocate, 82d Airborne Division, about the operation.<sup>176</sup> On that day, division judge advocates, still apparently unaware of the exact nature of the operation, reported to the deploying 2d Brigade to issue powers of attorney and answer personal legal questions.<sup>177</sup> The first formal briefing about the operation for the division staff judge advocate came on the evening of October 24. Originally, the division deployment plan did not include judge advocate support with the command group, but during the predeployment briefing the chief of staff, at the urging of the staff judge advocate, authorized deployment of a judge advocate as part of the assault command post.<sup>178</sup>

On October 25 the staff judge advocate departed by aircraft with other members of the assault command post. The trial counsel normally associated with the 2d and 3d Brigades deployed with their

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<sup>172</sup> See Bolger, *supra* note 169; Cragg, *supra* note 171.

<sup>173</sup> Bolger, *supra* note 169, at 58.

<sup>174</sup> See, e.g., DeCamp, *Grenada: The Spirit and the Letter of the Law*, Naval War C. Rev., May-June 1985, at 28; Romig, *The Legal Basis for United States Military Action in Grenada*, The Army Lawyer, Apr. 1985, at 1.

<sup>175</sup> Briefing Notes on Judge Advocate Activities During *Urgent Fury* (unpublished notes from the Office of The Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, North Carolina 28307) [hereinafter Corps Briefing].

<sup>176</sup> *Id.*

<sup>177</sup> Memorandum from Staff Judge Advocate, 82d Airborne Division to Staff Judge Advocate, XVIII Airborne Corps, subject: After Action Report — "Urgent Fury" (9 Nov. 1983) [hereinafter SJA Memo].

<sup>178</sup> *Id.*; Corps Briefing, *supra* note 175.

brigades.<sup>179</sup> Eventually, beginning on October 29, a few additional judge advocate personnel from XVIII Airborne Corps, the U.S. Army Trial Defense Service, the John F. Kennedy Center for Special Warfare, and the U.S. Army Claims Service arrived in Grenada.<sup>180</sup> The staff judge advocate returned to Fort Bragg with the assault command post on November 4, and the division deputy staff judge advocate deployed on that day to continue to provide legal services for the remaining elements of the 3d Brigade. A division legal representative remained in Grenada until about mid-December, when the last combat element departed.

A total of only eight judge advocates from the 82d Airborne Division went to Grenada. Most lawyers assigned to the division remained at Fort Bragg.<sup>181</sup> These judge advocates participated in family assistance briefings and provided many other normal services.<sup>182</sup> In addition, they supported legal personnel in Grenada by researching issues and forwarding necessary legal forms and documents to Grenada with the division air courier.<sup>183</sup>

From the time of his notification about the operation until redeployment, the staff judge advocate of the 82d Airborne Division kept a notebook identifying the issues he confronted.<sup>184</sup> Reflected in these notes are typical concerns that illustrate the issues that a judge advocate could encounter in future conflicts. They include: administration of the prisoner of war and detainee camp, to include segregation and classification of prisoners, detainees, and civilians; proper use of captured medical personnel; disposal of bodies and grave registration; legal assistance to servicemembers; division policy regarding protection of private property and looting; destruction of private property, such as livestock; arrangements for deployment of defense counsel; seizure and use of private vehicles for military purposes; disposition of captured weapons and equipment; combat bombing of a hospital; and establishment of rules of engagement. Interestingly, the Caribbean Security Force operated the prisoner of war camp until October 28, when provost marshal personnel arrived to assume authority. The first reports of military justice offenses, for larceny and assault of a

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<sup>179</sup>Corps Briefing, *supra* note 175; Interview with Lieutenant Colonel Richard H. Gasperini, Office of The Judge Advocate General, Headquarters, Dep't of the Army, Washington, D.C. (11 Feb. 1987) [hereinafter Gasperini Interview].

<sup>180</sup>SJA Memo, *supra* note 177.

<sup>181</sup>Letter from Staff Judge Advocate, 82d Airborne Division, to Staff Judge Advocate, XVIII Airborne Corps, subject After Action Report—Operation "Urgent Fury" (undated) [hereinafter 82d Report].

<sup>182</sup>*Id.*

<sup>183</sup>Gasperini Interview, *supra* note 179.

<sup>184</sup>SJA Memo, *supra* note 177. The staff judge advocate was Lieutenant Colonel Quentin Richardson.

noncommissioned officer, reached the staff judge advocate on October 29. Criminal Investigation Command (CID) personnel did not arrive until October 30. Also by the 30th, over 200 powers of attorney had been completed by the lawyers with the combat forces, and many soldiers were asking for wills.

### C. MILITARY JUSTICE

So many 82d Airborne Division court members and witnesses deployed to Grenada that no courts-martial were conducted at Fort Bragg, the Division Rear, until after most units returned.<sup>185</sup> The departure of nearly all commanders created jurisdictional issues for the Rear. Only one special court-martial convening authority, the 1st Brigade Commander, remained, and completion of a number of actions, including approving certain discharges, referring cases to trial, and imposing nonjudicial punishment on rear detachment personnel of deployed units, had to be postponed.<sup>186</sup> Due to the quick return of commanders, no special action was necessary to resolve these problems during the operation.

In Grenada, there was very little criminal justice activity during the short combat phase of the operation. When the fighting stopped, however, commanders began action on disciplinary infractions that had occurred, such as assault, sleeping on guard, disobedience of orders, and disrespect.<sup>187</sup> As a result, although no defense counsel had deployed initially, by the fourth day of the operation, incidents requiring conselling had occurred and arrangements were made to deploy Trial Defense Service attorneys.<sup>188</sup>

One of the most significant military justice issues in Grenada involved disposition of private and public property. Understandably, soldiers wished to retain souvenirs and war trophies as reminders of their experience, but wrongful taking of property is a crime. While in Grenada, rules on proper and improper retention of property were stressed by commanders, and notices explaining the law and the limited war trophy exception were published as directives.<sup>189</sup> Nevertheless, upon return to Ft. Bragg, a number of soldiers were tried or given nonjudicial punishment for improperly retaining captured items.<sup>190</sup>

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<sup>185</sup> 82d Report, *supra* note 181.

<sup>186</sup> SJA Memo, *supra* note 177.

<sup>187</sup> 82d Report, *supra* note 181.

<sup>188</sup> SJA Memo, *supra* note 177.

<sup>189</sup> Corps Briefing, *supra* note 175.

<sup>190</sup> Gasperini Interview, *supra* note 179

## **D. INTERNATIONAL LAW**

A number of law of war and civil affairs issues were considered by judge advocates in Grenada. Some were handled by 82d Airborne Division and XVIII Airborne Corps lawyers; others were considered by a specially deployed judge advocate international law expert and a civil affairs officer from the John F. Kennedy Center for Special Warfare.<sup>191</sup> Perhaps the most significant activities of these judge advocate advisors were making preliminary investigations of incidents and drafting legal documents for publication by both military and civilian authorities. In this regard, recall that events in Grenada were subject to severe scrutiny and publicity by media personnel. The early and proper handling of sensitive legal issues and the ability of legal advisors to consider ramifications beyond the immediate combat action, therefore, were perhaps the most important contributions they made to the operation. Issues addressed included the following.

### **1. Prisoners of War.**

As noted earlier, the 82d Airborne Division staff judge advocate gave early advice on care and treatment of prisoners and detainees. Allegations of prisoner mistreatment arose in the press, however, regarding the blindfolding of several prisoners.<sup>192</sup> A document, drafted by Army lawyers and issued by the military commander, on treatment of detainees helped reduce criticism. Eventually, the Secretary of State clarified the law of war at a press conference, citing the propriety of blindfolding prisoners under the 1949 Geneva Convention.<sup>193</sup>

### **2. War Crimes.**

Because there were a number of allegations of war crimes, the value of quick, thorough investigation by lawyers familiar with the law was clearly demonstrated. For example, during combat operations U.S. planes destroyed a portion of a mental hospital on the island.<sup>194</sup> This damage resulted in the death or injury of several hospital patients and was quickly reported in the press. Upon investigation by a judge advocate with international law expertise, it was noted that the hospital was not properly marked with red cross symbols and in fact, it had markings of the enemy People's Revolutionary Army.<sup>195</sup> Further investigation disclosed that U.S. forces had received fire from the

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<sup>191</sup>Corps Briefing, *supra* note 175. Lieutenant Colonel Norman Hamelin was the judge advocate; Major Ann Wright was the civil affairs officer. *See also* House, *Grenada: Army Reserve Goes Into Action*, Army Reserve Magazine, Spring 1985, at 19.

<sup>192</sup>Corps Briefing, *supra* note 175.

<sup>193</sup>*Id.*

<sup>194</sup>*Id.*

<sup>195</sup>*Id.*

base of the hospital. Pictures taken by the investigating lawyer helped demonstrate that no law of war violation was committed by U.S. forces.<sup>196</sup> In another incident, the events surrounding the alleged killing of a downed Marine pilot were clarified by the quick reporting and rapid investigating by a judge advocate.<sup>197</sup>

### 3. *Local Ordinances.*

In the aftermath of the combat operations, establishing law and order on the island was a priority of the civilian authorities. On November 1, the Governor General issued a proclamation declaring a state of emergency.<sup>198</sup> By mid-November, the Acting Attorney General of Grenada, with the assistance of an Army lawyer, devised a preventive detention ordinance that described authority for arrest, detention, and search of persons acting contrary to the public interest.<sup>199</sup> This ordinance was extended to permit members of the U.S. Peacekeeping Force to stop and search vehicles when necessary. Advice given on the wording of this ordinance demonstrates the close involvement of judge advocate personnel with Department of State representatives and local officials. The need for judge advocate familiarity with civil affairs issues is obvious.

## E. ADMINISTRATIVE LAW

Deployment of most board members required postponement of scheduled 82d Airborne Division board actions. Administrative law attorneys in the Rear continued to provide advice on issues related to combat operations, however.<sup>200</sup> For example, advice was given about the law regarding captured and abandoned property.<sup>201</sup> Communications between Grenada and the Rear facilitated resolution of legal issues, because research could be done at Fort Bragg, where reference material was available. Limited references in Grenada initially made research of issues difficult. After completion of combat operations, a useful function for judge advocate personnel was investigating var-

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* The judge advocate providing assistance was Lieutenant Colonel John P. Weber, Chief, Administrative Law, XVIII Airborne Corps, who deployed to Grenada with the corps advance party on October 29, 1983. *Id.*

<sup>200</sup> SJA Memo, *supra* note 177.

<sup>201</sup> *Id.*

<sup>202</sup> Interview with Colonel Quentin Richardson, Office of the Chairman, Joint Chiefs of Staff, Washington, D.C. 20310-5000 (Dec. 3, 1986) [hereinafter Richardson Interview]. The primary reference he used as the Staff Judge Advocate, 82d Airborne Division, was Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare (July 1956). This was the only reference that he could easily carry for the anticipated air drop.

ious incidents. For example, in addition to investigation of claims and law of war incidents by lawyers outside the division, division judge advocates investigated matters for the command, such as a strafing incident and a homicide.<sup>203</sup>

## F. LEGAL ASSISTANCE

During the initial phases of *Urgent Fury* both staff judge advocate and Trial Defense Service attorneys serving the 82d Airborne Division concentrated on legal assistance matters.<sup>204</sup> Counsel were dispersed to alerted units, where they executed numerous wills and powers of attorney. As the mission progressed, unit requests for assistance began to exceed the ability of assigned lawyers to provide services. Despite the high readiness status of the division and the relatively good deployment preparation program, within the first seventy-two hours of the operation approximately 1500 powers of attorney and over 100 wills were executed.<sup>205</sup>

Legal assistance demands in Grenada were unanticipated. By the third day of the operation there were long lines of soldiers waiting to see the single judge advocate accompanying each brigade.<sup>206</sup> In addition to wills and powers of attorney, perhaps due to the onset of payday, many questions involved paying debts and cashing payroll checks.<sup>207</sup>

Assistance to family members in the Rear was also extensive. Judge advocates participated in family assistance briefings, given to family members of deploying soldiers, and also staffed the Family Assistance Center, which was manned around-the-clock.<sup>208</sup> Obtaining powers of attorney from soldiers in Grenada, or locating unit-retained copies of completed documents for sponsors, were among the services provided.<sup>209</sup> In addition, coordination with local banks was accomplished to allay fears of many family members that these banks would not honor general powers of attorney to cash payroll checks.<sup>210</sup>

## G. CLAIMS

Claims operations in Grenada constituted a significant judge advocate activity that facilitated achievement of good will among the

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<sup>203</sup> Gasperini Interview, *supra* note 179.

<sup>204</sup> SJA Memo, *supra* note 177.

<sup>205</sup> *Id.*

<sup>206</sup> 82d Report, *supra* note 181.

<sup>207</sup> Gasperini Interview, *supra* note 179; Richardson Interview, *supra* note 202.

<sup>208</sup> SJA Memo, *supra* note 177.

<sup>209</sup> Gasperini Interview, *supra* note 179.

<sup>210</sup> SJA Memo, *supra* note 177.

Grenadian people.<sup>211</sup> Claims operations did not occur, however, until after most combat operations had ended.

Initial contact between judge advocate personnel of XVIII Airborne Corps and the United States Army Claims Service, Fort Meade, Maryland, about appointment of a foreign claims commission occurred on October 27,<sup>212</sup> two days after the deployment of the 82d Airborne Division assault forces. On October 28, the Department of Defense gave the Army single-service responsibility to settle claims arising from U.S. military operations in Grenada.<sup>213</sup> On October 30, the XVIII Airborne Corps command representative in Grenada directed initiation of a claims operation. Because of the limited communications between the island and the U.S., however, it was not until November 2 that the Army Claims Service appointed two one-member and one three-member foreign claims commissions.<sup>214</sup> Four of the commissioners were lawyers: three from XVIII Airborne Corps and one from the John F. Kennedy Center for Special Warfare. The fifth was an active duty civil affairs officers.<sup>215</sup>

After coordination with local officials, a site for a central claims reception facility was located, and from October 31 until November 7 damage surveys were conducted at various locations around the island.<sup>216</sup> Public announcements of the opening of the office were made, and the office opened on November 7.

In addition to settling claims for personal injury, death, and property damage incident to noncombatant activities under the Foreign Claims Act, Army claims personnel eventually coordinated with the Department of State and the Agency for International Development to obtain funds and establish procedures for claims arising during combat.<sup>217</sup> Military and civilian experts from the U.S. Army Claims Service visited Grenada, and, although the original claims office on the island closed in mid-December 1983, claims continued to be processed. By late 1984, over 1300 claims totaling nearly \$2,000,000 had been paid.<sup>218</sup>

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<sup>211</sup> See Harris, Grenada—A Claims Perspective, *The Army Lawyer*, Jan. 1986, at 7.

<sup>212</sup> Letter to Staff Judge Advocate, XVIII Airborne Corps, subject: Claims Operations in Grenada—After Action Report/Lessons Learned (9 Mar. 1984) [hereinafter *Corps Claims Report*].

<sup>213</sup> Harris, *supra* note 211, at 7.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Corps Claims Report*, *supra* note 212.

<sup>217</sup> Harris, *supra* note 211, at 8; U.S. Army Claims Service, Memorandum for Record, subject: Claims Responsibility for Grenada Operations (After Action Report) (4 Apr. 1984).

<sup>218</sup> *Corps Claims Report*, *supra* note 212.

While the XVIII Airborne Corps and U.S. Army Claims Service after-action reports listed a number of lessons learned, two are of particular interest to commanders and staff judge advocates.

*1. Early Investigation.*

Ascertainment of relevant facts is essential to payment of legitimate claims. Because combat damage is not payable under the Foreign Claims Act, it must be determined whether damage or injury was caused by U.S. forces during combat. Interests of both the claimant and government are served when facts are ascertained quickly. Consequently, foreign claims commissioners should be appointed before deployment, deploy early in an operation, and quickly become familiar with the tactical situation.<sup>219</sup> Claims personnel should have transportation assets and, for security purposes, be armed.

*2. Use and Disposition of Property.*

During the early stages of *Urgent Fury*, property was damaged or taken by military personnel and homes were abandoned by inhabitants. In some cases, private property was removed from local buildings and used. After the claims office opened, claims were submitted, for example, for damage to buildings from shelling, for "looting," for use and damage of vehicles seized, and for use of abandoned buildings as shelters.<sup>220</sup> Investigation often disclosed that alleged looting could not have been done by U.S. Forces, but the allegation itself demonstrates the need for knowledge of property rules, disciplined soldiers, and an established system to investigate and refute charges of misconduct. This can be accomplished, for example, by issuing receipts for seized property and by making an inventory that records the condition of property requisitioned or seized. Establishing procedures for requisitioning property, and training soldiers about proper and improper disposition of captured and abandoned property is necessary to protect not only the claimant but also soldiers, the command, and the government.

In many cases, claims were paid for damage probably not caused by U.S. soldiers because of the lack of information about the condition of the property at the time it was seized.<sup>221</sup> Other claims, such as for use of buildings, were not payable as claims but were in some instances ratified as leases by the Corps of Engineers, the organization with authority for real estate transactions.<sup>222</sup> Similarly, a significant

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*



number of claims were submitted from individuals and businessmen who had provided goods and services to U.S. forces. These were generally contract claims, and thus not payable under the Foreign Claims

From the standpoint of the staff judge advocate and commanders, the entire claims operation demonstrates the critical need for predeployment establishment of procedures for procurement of property and education about proper use and disposition of property.<sup>224</sup>

#### IV. OBSERVATIONS AND CONCLUSIONS

As the number of legal issues facing Army judge advocates increases, there is a tendency to concentrate on everyday problems, sometimes to the detriment of wartime planning. Some judge advocates view wartime planning as no big concern and feel that lawyers will be there when needed as they have been in the past. The current interest in operational law and predeployment planning suggests that this is not the view of today's judge advocate leadership, but more still needs to be done. One speciality that makes Army lawyers different from civilian attorneys is expertise in providing wartime legal services. Judge advocates must never lose their competence in this area.

To provide quality legal services during conflicts, judge advocates practicing at the operational level must understand the difference between peacetime and wartime services. They must plan for the transition between these periods and train in peacetime to handle the substantive issues unique to combat operations. This review of legal services during World War II and Grenada is intended to provide guidance for performing these functions. In addition, the study identifies institutional legal issues that require further consideration by the Army as a whole. In many cases, the groundwork for handling these issues has already begun; in others we are just starting to face the problems. While subject to different interpretations, some of the more important operational and institutional issues will be addressed together under the topics that follow.

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<sup>223</sup>Corps Claims Report, *supra* note 212.

<sup>224</sup>*See also* Letter to Director, Training and Doctrine Division, U.S. Army Soldier Support Center from Chief, International Law Team, Office of The Judge Advocate General, Department of the Army (28 May 1986) (responding to the Center for Army Lessons Learned issue, raised by the Grenada operation, intimating that there was a lack of knowledge of the law of land warfare, particularly as to the rules and procedures that apply to destruction, seizure, requisition, and disposition of property during combat operations).

## **A. MILITARY COMMISSIONS**

Although mentioned in the Manual for Courts-Martial<sup>225</sup> and the Uniform Code of Military Justice,<sup>226</sup> guidance for use of military commissions is virtually nonexistent. This must be corrected. The Army should determine if military commissions will ever be used again, and if so, develop a training program to educate Army lawyers and commanders about their use.

## **B. INTERNATIONAL LAW, CIVIL AFFAIRS, AND MILITARY GOVERNMENTS**

While nearly all civil affairs units in the Army are in the Reserve,<sup>227</sup> our experience in both World War II and Grenada demonstrates that judge advocates will be involved in providing legal advice about military relations with civilian governments and the civilian population. We should examine civil affairs and judge advocate missions and clarify the relationship between them. The staff judge advocate should be responsible for giving all legal advice to the commander; there is no need for a separate civil affairs legal staff. An evaluation is being conducted at The Judge Advocate General's School, U.S. Army, to determine the number of specially qualified active Army civil affairs judge advocates likely to be needed before the deployment of Reserve civil affairs legal assets. Additionally, from an operational standpoint we need a program to gather and publish key reference material, to include sample proclamations, ordinances, laws, and notices, and we should train both judge advocates and commanders about their authority and responsibility for civil affairs and military governments.

During conflicts, judge advocates must be ready to provide quick and accurate advice on law of war issues, to include treatment of prisoners of war, disposition of property, and war crimes. We must expect that the media will be present and public opinion will be influenced by proper compliance with accepted international legal standards. Consequently, it is critical that soldiers, commanders, and judge advocates know and comply with rules of land warfare. Law of war training should be part of every Staff Judge Advocate Course and Senior Officers' Legal Orientation at The Judge Advocate General's School.

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<sup>225</sup> Manual For Courts-Martial, United States, 1984.

<sup>226</sup> 10 U.S.C. §§ 801–940 (1982).

<sup>227</sup> House, *supra* note 191, at 19. See generally Dep't of Army, Field Manual No. 41-10, Civil Affairs Operations (Dec. 1985).

Doctrine, training programs, and educational material in this area are now under evaluation.<sup>228</sup> In the future, the corps staff judge advocate office will have, in addition to a Chief of International Law, an attorney designated as the Chief of Plans, Operations, and Training.<sup>229</sup> These attorneys will function as long-range operational planners in their respective areas; both should be experienced in international law matters. Responsibilities of the Plans, Operations, and Training Officer will include conducting law of war training, reviewing operations plans, and coordinating transition of legal services from peacetime to combat. The Chief of International Law will serve as the civil affairs and military government advisor, and be responsible for war crimes investigations. He or she must ensure that corps operational plans include early deployment of war crimes investigation teams with combat units.

### ***C. COMPENDIUM OF REFERENCE MATERIAL***

Obviously, no one knows the answers to all legal questions that are likely to occur during conflicts, and it is probable that relatively inexperienced judge advocates will accompany deploying forces to combat zones. This probability makes it imperative that key reference material, expected to be useful during the initial phases of combat, be published in a lightweight, transportable document. A compendium in the current "Update" format might be acceptable, or our emerging computer technology may provide other alternatives.<sup>230</sup> It should include general reference material on the law of war, prisoners of war, disposition of property, graves registration, civil affairs, and military government, as well as more specific references covering the deployment area, such as country studies, applicable treaties, other agreements, and digests of local law.

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<sup>228</sup> A new field manual, FM 27-XX, describing current JAGC doctrine and operational law requirements is under development.

<sup>229</sup> A new Table of Organization and Equipment (TOE) for the Army corps has been developed and is now awaiting approval from the Deputy Chief of Staff for Operations, Headquarters, Department of the Army. See Corps (HHC), TOE No. 52401(HHC)J000 (boarded at Headquarters, U.S. Army Training & Doctrine Command, 19 June 1985). The TOE establishes a new position in the staff judge advocate office for a Chief, Plans, Operations, and Training. For a discussion of corps operational law planning, see Coleman, *Operational Law and Contingency Planning at XVIII Airborne Corps*, The Army Lawyer, Mar. 1988, at 17.

<sup>230</sup> With current computer technology, it will be possible to set up a central computerized legal database, perhaps at The Judge Advocate General's School, that any judge advocate with a computer and communications capability will be able to tap. The database could contain specialized military reference material and be available in both peacetime and wartime. Judge advocates could establish an on-line link to the database, or, upon deployment, download pertinent reference material to store for use on a portable personal computer.

## ***D. STUDY OF WARTIME LEGAL ISSUES***

To better understand their unique role of providing legal support during conflicts, all judge advocates should have the opportunity to study lessons learned from prior conflicts. Just as operational commanders study tactics and lawyers study case precedent, judge advocates should study legal services from past conflicts. In addition to military commissions, civil affairs issues, and military government rules, topics deserving study include peacekeeping operations, capital referrals during combat, and alternatives to judicial and nonjudicial punishment during combat. To facilitate such study, judge advocate wartime after-action reports, oral histories of senior judge advocates, and other historical material, to include judge advocate portions of annual historical summaries, should be consolidated at The Judge Advocate General's School.<sup>231</sup> The Judge Advocate General's School already has an active oral history program, conducted as an elective for students at the Judge Advocate Officer Graduate Course.<sup>232</sup> It should concentrate on completing oral histories of key judge advocates who served in Vietnam, Grenada, Korea, and recent peacekeeping operations. We should also ensure that the periodic updates of the Judge Advocate General's Corps history<sup>233</sup> focus on wartime issues and useful historic data.

## ***E. PLANNING THE TRANSITION FROM PEACETIME TO WARTIME SERVICES***

Planning for the transition from peace to war at the operational level requires consideration of contingency plans of the unit served as well as other variables, such as whether plans are for a division, corps, or echelon above corps. Staff judge advocates must understand how their people are allocated between the Table of Organization and

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<sup>231</sup> Interestingly, judge advocate historical material is widely scattered. For example, I found World War II after-action reports and some oral histories of senior judge advocates at the Army Military History Institute, Carlisle, Pennsylvania. Other material, such as the command history of the Military Assistance Command Vietnam and recent division histories, were at the Center for Military History, Washington, D.C. Still other material is at the Army Library, Washington, D.C., and the National Archives. The Judge Advocate General's School, Charlottesville, Virginia, has some, but not all, of the material used in this article.

<sup>232</sup> See The Judge Advocate General's School, Communications Electives, ch. 9 (Aug. 1987). Thus far, the School's program has finished oral histories for several former Judge Advocates General, as well as the noted military historian, Colonel Frederick Bernays Wiener (ret.); the first chief of the Trial Defense Service, Colonel Robert C. Clarke (ret.); and the first staff judge advocate of the Southern European Task Force, Colonel Howard S. Levie (ret.).

<sup>233</sup> See The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975; Park, *The Army Judge Advocate General's Corps, 1975-1982*, 96 Mil. L. Rev. 5 (1982).

Equipment (TOE) and the Table of Distribution and Allowances (TDA). When a combat unit deploys, its TOE legal personnel must have the capability to fully support the unit, while the TDA personnel (with possible augmentation from the Reserve) must continue to meet all the legal needs of the garrison. The staff judge advocate must allocate TDA and TOE personnel to meet both needs. The World War II and Grenada experiences suggest that legal service planning should be divided into at least four phases: predeployment, deployment, combat, and postcombat. Some of the key planning considerations for these phases follow.

### *1. Military Justice*

Operationally the level and nature of the conflict will determine whether transfer of pending cases to another jurisdiction upon deployment should be considered along with when and where trials in the unit area will be held and whether defendants and witnesses will be immediately returned to a centralized location, such as the rear, pending investigation and trial. During combat, there may be an initial period of inactivity in bringing criminal actions, but this period is likely to be quite short. Under the present Uniform Code of Military Justice,<sup>234</sup> the need for defense counsel is likely to be far greater than in past wars, and it may be necessary to deploy defense counsel with brigades or even smaller units. The establishment of the Legal Services Command as a TOE unit<sup>235</sup> will give the Corps the flexibility it needs to place defense counsel where they are most needed in the combat units. We should also plan for establishing area courts-martial jurisdictions to support combat commands, and designate responsibility for activating area courts-martial authority. Local staff judge advocates and commanders should evaluate the consequences of capital referrals and determine those types of cases that exigencies may preclude trying.

Finally, the Army should evaluate establishment of a commanders' summary disciplinary system to be operational during conflicts. Such a system could, for example, increase current nonjudicial punishment

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<sup>234</sup> 10 U.S.C. §§ 801-940 (1982).

<sup>235</sup> The Judge Advocate General's Corps has developed a Table of Organization and Equipment that, for the first time, allocates spaces in the combat force for defense counsel and military judges. The new organization, the Legal Services Command, will be commanded by the Commander, U.S. Army Legal Services Agency. Some defense counsel and military judges now on Tables of Distribution and Allowances (TDAs) will be shifted to the new TOE to recognize that they are part of our combat force. The TOE is awaiting approval from the Office of the Deputy Chief of Staff for Operations, Headquarters, Department of the Army. *See* Legal Services Command, TOE No. 27602L000 (boarded at Headquarters, U.S. Army Training and Doctrine Command. 14 Aug. 1987).

limits and exclude the right to consult with counsel or demand trial by court-martial. Recalling that in World War II accused soldiers were defended even in courts-martial by readily available nonlawyers, it seems reasonable to establish an alternative procedure to provide combat commanders with an effective and timely disciplinary system.

## *2. Administrative Law*

Predeployment planning should consider the capabilities of the garrison TDA force to handle pending administrative law actions upon deployment of the TOE units. Reserve units and Individual Mobilization Augmentees (IMAs) assigned to the garrison should be familiar with administrative law; staff judge advocates should use peacetime training to keep them abreast of current developments. Predeployment training of commanders and soldiers should emphasize disposition of property rules and procedures. During operations, a system of researching legal issues and communicating answers to forward-deployed lawyers will need to be established. The deployment of the Army's Tactical Combat Computer System—Common Hardware and Software (ATCCS-CHS) in staff judge advocate offices will give the Judge Advocate General's Corps the ability to establish a LEXIS- or WESTLAW-type database that attorneys will be able to query from the field. Depending on the extent of the database, the deployed attorney could have full access to a complete law library.

## *3. International Law*

Predeployment training of soldiers, commanders, and lawyers on law of war issues likely to occur is critical. The Judge Advocate General's School currently conducts a Law of War Workshop in which both line officers and judge advocates consider legal issues they may face on the battlefield. Such joint training opportunities are crucial to smooth functioning in wartime. In addition, responsibility should be set for activation of war crimes investigating teams. War crimes investigators, even those with a background in criminal investigations, will need training about unique investigative requirements of law of war offenses. Consideration should be given to establishing law of war investigating teams under the supervision of judge advocates. Commanders and lawyers should determine the civil affairs and military government issues likely to occur during combat and post-combat phases of any operation.

## *4. Claims*

Predeployment training of combat commanders and soldiers should emphasize claims standards and procedures. The World War II and

Grenada experience shows the value of prompt and fair settlement of claims from the population in a foreign country. We should continue to plan for claims commissions to follow closely behind combat echelons. Ensuring that commanders and soldiers understand the value of timely investigation and the responsibility of the commissions is essential.

### *5. Legal Assistance*

Predeployment programs should continue to emphasize the value to soldiers of keeping documents current that provide for family members during a soldier's absence. We should continue efforts to expand the annual check of a soldier's records to include asking him or her to consider whether he or she needs to update wills or powers of attorney (or have these documents drafted). The Army is now developing an "electronic dogtag," the Individually Carried Record (ICR).<sup>236</sup> This will store pertinent personal data on a card the soldier can carry upon deployment; information about wills and powers of attorney can be encoded on the ICR. Staff judge advocates must anticipate realignment of assets upon deployment so that they can continue to provide legal assistance both to deploying units and to family members remaining in the sustaining base area. Depending on the scope of the operation, responsibility for legal assistance at the sustaining base area may be transferred to judge advocates in other organizations. The likelihood of using judge advocates who in peacetime normally perform other legal duties emphasizes the necessity of continual cross-training of all lawyers in legal assistance.

### *6. Administrative Considerations*

Plans for legal services during war must include the use of Judge Advocate General's Legal Service Organization personnel (JAGSOs).<sup>237</sup> They will be available within Legal Support Organizations to provide war crimes and claims investigating teams and staff judge advocate support for area courts-martial authorities in the theater of operations.

## **V. POSTSCRIPT**

To be prepared to handle legal issues likely to occur during future conflicts, we must make a serious effort during peacetime to study and to train commanders, soldiers, and lawyers about the unique legal issues that occur during war. This responsibility should not be taken lightly; it is the key distinction of service as an Army lawyer.

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<sup>236</sup> See Operational and Organization Plan for the Individually Carried Record (ICR) System, approved by Headquarters, U.S. Army Training and Doctrine Command, 16 Nov. 1987.

<sup>237</sup> See Dep't of Army, Reg. No. 27-4, Legal Services, Judge Advocate General Service Organizations: Training, Employment, and Administration (1 Feb. 1981).

# NEW PROTECTIONS FOR VICTIMS OF INTERNATIONAL ARMED CONFLICTS: THE PROPOSED RATIFICATION OF PROTOCOL II BY THE UNITED STATES

by Captain Daniel Smith\*

## I. INTRODUCTION

On January 29, 1987, President Reagan submitted to the Senate for ratification the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II).<sup>1</sup> The reasons for seeking ratification were set forth in the President's Message to the Senate transmitting the Protocol:

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective to giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.<sup>2</sup>

Protocol II was negotiated at a diplomatic conference convened by the Swiss Government in Geneva, and was signed by the United States and 101 other nations in 1977.<sup>3</sup> Protocol II is intended to expand and improve upon the basic humanitarian standards of Common

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<sup>1</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

<sup>2</sup>Message from the President of the United States to the Senate Transmitting The Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating To The Protection of Victims of Non-International Armed Conflicts, Concluding At Geneva On June 10, 1977. January 29, 1987, S. Treaty Doc. No. 2, 100th Cong., 1st Sess. (1987).

<sup>3</sup>As of January 1, 1986, 48 states have become parties to Protocol II. Bowman and Harris, *Multilateral Treaties, Index and Current Status*, 3rd Cum. Sup. 81 (Jan. 1, 1986). China and France are the only major powers that have adopted Protocol II.



Article 3 of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War,<sup>4</sup> which governs noninternational armed conflicts.<sup>5</sup> This article analyzes the proposed ratification of Protocol II by the United States. It will briefly review the development of humanitarian law regulating internal conflicts and the United States involvement in this process. Next, it will examine whether the recommended application of Protocol II is consistent with the United States goal of granting the greatest possible protection to victims of war, within the limits of legitimate military requirements.

## 11. THE AMERICAN CIVIL WAR

The United States has long had an interest in the laws governing noninternational armed conflict. This interest has its roots in the American Civil War.<sup>6</sup> One man particularly devoted to setting forth rules of conduct during this conflict was Dr. Francis Lieber.<sup>7</sup> When the South fired upon Fort Sumter in 1860, Lieber was an established professor of law at what was then Columbia College in New York. At the outbreak of the conflict, many serious questions arose concerning the laws governing civil wars, and Lieber sought to clarify these problems. The most significant of these concerns was the treatment of captured Southern soldiers. The North maintained that the conflict was an internal matter and that anyone seeking to dismember the Union was a rebel who could be tried for treason.<sup>8</sup> This position became difficult to maintain when the Confederates captured a large number of Union soldiers and officers in the Battle of Bull Run in 1861 and requested an exchange of prisoners. Political pressure mounted

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<sup>4</sup>Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

<sup>5</sup>On the characterization of noninternational armed conflicts in international humanitarian law, see Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 Am. J. Int'l L. 589, 603 (1983); Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, Int'l. Rev. Red Cross, No. 230, Sept.-Oct. 1982, at 255, 258.

<sup>6</sup>For a review of the law of war governing the American Civil War, see Wright, *The American Civil War, 1861-1865*, in *The International Law of Civil War* 30 (R. Falk ed. 1971).

<sup>7</sup>For a general discussion of Dr. Lieber and his works, see F. Freidel, Francis Lieber (1977); R. Hartigan, *Lieber's Code and the Law of War* (1983); Garner, *General Order 100 Revisited*, 27 Mil. L. Rev. 1 (1965); Nys, *Francis Lieber—His Life and Works*, 5 Amer. J. Int'l L. 84 (1911).

<sup>8</sup>F. Freidel, *supra* note 7, at 320.

for an exchange, but officials in Washington feared that such an exchange would amount to recognition of the Southern Confederacy.<sup>9</sup> Lieber researched international law and came up with a solution. He found that, even in times of rebellion, customary rules of warfare and treatment of prisoners should be observed for humanitarian reasons.<sup>10</sup> This adherence to humanitarian norms did not involve recognition of the Southern Confederacy, nor did it preclude the North from trying the rebels for treason after the war. Lieber's opinion was expressed in an open letter to US Attorney General Edward Bates that was published in the New York papers in August 1861. Because the opinion was based soundly upon international law and provided a solution to a pressing issue, it became official policy.<sup>11</sup>

Lieber was not satisfied that the laws governing war would be applied to this cruel armed conflict. He believed more codification of rules was imperative. On November 13, 1862 Lieber made a historical request to his friend General Halleck, the General-in-Chief of the Union Armies:

My dear General,

Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent issues occurring under the Law and usages of War, and on which our Articles of War are silent. The last phases of our war, and the things which have come to light by the recent inquiries into the conduct of certain officers, have at length induced me to write to you on the subject. I address you as the jurist, no less than as the soldier.

My idea is—I give it as a suggestion to you—that the President as Commander in Chief, through the Secretary of War, ought to appoint a committee, say of three, to draw up a code, if you choose to call it so, in which certain acts and offenses (under the Law of War) ought to be defined and, where necessary, the punishment be stated.<sup>12</sup>

After making this proposal, Lieber emphasized the absence of any such code in other countries:

I do not know that any such thing as I design exists in any other country, and in all other countries the Law of War is

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<sup>9</sup>*Id.*

<sup>10</sup>R. Hartigan, *supra* note 7, at 9.

<sup>11</sup>See W. B. Hesseltine, *Civil War Prisons: A Study in War Psychology* (1930).

<sup>12</sup>"Letter from F. Lieber, New York, to General Halleck, Washington (13 Nov. 1862) [hereinafter Halleck letter], in Lieber Papers, Huntington Library, San Marino, California. For a collection of selected correspondence between Dr. Lieber and General Halleck during the American Civil War, see R. Hartigan, *supra* note 7.

much more reduced to naked Force or Might, than we are willing to do it, especially now, perhaps, in this Civil War, and there exists much more thorough organization in those countries; nor do single wars extend there over such distances as here.<sup>13</sup>

General Halleck did not accept this proposal immediately, but Lieber persisted and a committee was officially established on December 17, 1862. The result of this committee was the landmark code published by the War Department in April 1863 as General Order No. 100, Instructions for the Government of the Armies of the United States in the Field.<sup>14</sup> The document comprised ten sections with 157 articles. The order is commonly referred to as the Lieber Code.

Although the Lieber Code gained official recognition as General Order No. 100, Union officers did not immediately accept it.<sup>15</sup> The Confederacy considered the code to be propaganda and criticized it for "allowing too much latitude to Union troops in occupied Southern territory."<sup>16</sup> Despite these problems, "the standards set by the code seem to have been generally observed by both sides during the Civil War."<sup>17</sup> Captured enemy soldiers were generally treated as "prisoners of war" in accordance with Lieber's code. The great loss of life that occurred in both northern and southern prisons has been attributed to disease, cold weather, and inadequate food, rather than international mistreatment.<sup>18</sup> Property rights were also generally protected during and after the Civil War. At the end of the war, the United States seems to have observed the provisions of the Lieber Code dealing with war crimes. These provisions were applied against Captain Henry Wirtz, who was tried and executed for brutal treatment of Union prisoners at Andersonville, a Confederate prison.<sup>19</sup> The North chose not to prosecute any Confederate leader for treason, an option permitted under Lieber's Code. Some recorded acts of the Civil War seem inconsistent with Lieber's Code,<sup>20</sup> but on the whole, the parties conformed to the law of war as then understood.

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<sup>13</sup>Halleck letter, *supra* note 12.

<sup>14</sup>General Order No. 100 is reprinted in The Laws of Armed Conflict 3 (D. Schindler and J. Taman eds. 1981), and in R. Hartigan, *supra* note 7, at 45-71.

<sup>15</sup>R. Hartigan, *supra* note 7, at 20.

<sup>16</sup>*Id.*

<sup>17</sup>The observation of the law of war by the North and South is analyzed in Wright, *supra* note 6, at 54-74.

<sup>18</sup>*Id.* at 61.

<sup>19</sup>*Id.* at 73.

<sup>20</sup>The most controversial humanitarian issues arose in connection with General Sherman's march through Georgia and the bombardment of cities, especially Atlanta. These acts were analyzed under Lieber's Code in Wright, *supra* note 6, at 64-65.

<sup>21</sup>Letter from F. Lieber to General Halleck (May 29, 1863) in Lieber's Papers, Huntington Library, San Marino, California; *see also* note 12.

Francis Lieber told General Halleck that General Order No. 100 “will do honor to our country” and it “will be adopted as a basis for similar works by the English, French and Germans.”<sup>21</sup> History has proved his predictions to be correct. The governments of Prussia, France, and Great Britain did copy Lieber’s Code, and it greatly influenced the Hague Conventions of 1899 and 1907. The order also brought international recognition to the United States as a country that was in the forefront of efforts to codify and improve the rules of armed conflict.<sup>22</sup>

In the United States, the Lieber Code was the basis for instruction in the law of war for the United States Army during the Spanish-American War, and it was adopted almost completely in the U.S. Army Field Manual of 1914.<sup>23</sup> When the United States entered World War II, the Lieber Code was incorporated in the United States Army Field Manual.<sup>24</sup>

### III. THE DEVELOPMENT OF INTERNATIONAL STANDARDS GOVERNING NONINTERNATIONAL ARMED CONFLICTS

The events of World War II led to the four Geneva Conventions of August 12, 1949 for the Protection of Victims of War.<sup>25</sup> At the 1949 Diplomatic Conference, the delegates of many states believed the Geneva Conventions should apply to both civil and international armed conflicts.<sup>26</sup> This position was certainly influenced by Lieber, who be-

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<sup>22</sup>Lieber’s influence on the laws governing war was described by Frederic de Marten, who wrote:

So it is to the United States of North America and to President Lincoln that belongs the honor of having taken the initiative in defining with precision the customs and laws of war. This first official attempt to codify the customs of war and to collect in a code the rules binding upon military forces has notably contributed to impress the character of humanity upon the conduct of the northern states in the course of that war.

F. de Martens, *Precis du Droit des Gens Moderne de l’Europe* (1879).

<sup>23</sup>R. Hartigan, *supra* note 7, at 23.

<sup>24</sup>F. Freidel, *supra* note 7, at 340; U.S. War Department, Field Manual No. 27-10, *Rules of Land Warfare* (1940).

<sup>25</sup>Geneva Conventions, *supra* note 4.

<sup>26</sup>Advocates of this application of the Geneva Conventions argued that in some civil wars, those who are regarded as rebels are actually patriots struggling for the independence and dignity of their country. It was asserted that the inclusion of the reciprocity clause in all four Conventions would be sufficient to allay the apprehensions of the opponents of this proposal. A review of the background and history of Common Article 3 is provided in Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Treatment of Prisoners of War 29 (J. Pictet ed. 1960) [hereinafter Pictet].

lieved that rules of warfare could be observed during internal conflicts without giving recognition to the rebel forces. The initial proposal by the International Committee of the Red Cross (ICRC) incorporated this view, and explicitly provided that the application of the Geneva Conventions to internal armed conflicts would not affect the status of the parties.<sup>27</sup> The proposal, however, met stiff resistance from a considerable number of delegates. Many states feared unqualified application of the Conventions to an internal armed conflict would give rebels *de facto* status as belligerents and possibly even *de jure* legal recognition. They believed observance of the Conventions would hamper the legitimate repression of rebellions and wanted to limit the laws of war to traditional armed conflicts between states.<sup>28</sup> These states particularly did not want to give rebels prisoner of war status, with its attendant immunity for lawful actions on the battlefield.

Common Article 3 was the compromise between these two views; it provides some minimum protections for victims of internal armed conflicts, while avoiding any recognition of the rebel forces or any rebel entitlement to prisoner of war status. It states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

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<sup>27</sup>See Pictet, *supra* note 26, at 31

<sup>28</sup>*Id.* at 32.

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

Common Article 3 was a major step toward recognizing the need for basic humanitarian protections for noncombatants in internal armed conflicts. It represented the first internationally accepted law that regulated a state’s treatment of its own nationals in internal armed conflicts.<sup>30</sup> The articles also established that the laws governing internal armed conflict were of legitimate international concern.

Although Common Article 3 advanced the laws governing internal armed conflicts, it has not been very effective from a practical standpoint. Some governments have explicitly accepted the applicability of Common Article 3 and have attempted to comply with it, but these have been the exception, rather than the general rule.<sup>31</sup> Most governments have been reluctant to admit the existence of “armed conflicts” within their states. They still fear the rebels will gain international legal status as insurgents or belligerents if Common Article 3 is applied to the internal strife. To compound this problem, the text of Common Article 3 and its drafting history do not clearly define the term “noninternational armed conflict”. This has made it easier for states to deny that the provision applies. Finally, Common Article 3 sets forth very general principles, rather than the precise standards of conduct necessary to regulate the conduct of states effectively.

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“Geneva Conventions, *supra* note 4, art. 3.

<sup>30</sup> See Forsythe, *Legal Management of Internal War: The 1977 Protocol On Non-International Armed Conflicts*, 72 *Amer. J. Int’l L.* 272 (1978).

<sup>31</sup> The relevance of Common Article 3 to situations of violence during the period 1949 to 1975 is reviewed in Forsythe, *supra* note 30, at 275.

The many internal armed conflicts since 1949 have highlighted the deficiencies in Common Article 3 and illustrated the need to develop new rules for regulating internal armed conflict. From 1974 to 1977, 124 states, 50 nongovernmental organizations and 11 national liberation movements participated in one or more of the four Diplomatic Conferences that produced the two Protocols Additional to the Geneva Conventions of 12 August 1949.<sup>32</sup> Protocol I was intended to update the law of war regulating international armed conflict between states.<sup>33</sup> Protocol II was adopted to regulate internal armed conflicts. It has made significant advances in this area. Protocol II sets forth, with more specificity than Common Article 3, the fundamental rights of noncombatants, that is, people who are not involved in the conflict, or who have ceased to take part in the hostilities.<sup>34</sup> Protocol II provides greater protection for civilians, children, and medical and religious personnel.<sup>35</sup> It also articulates more specific due process guarantees and standards for treatment of persons deprived of their liberty.<sup>36</sup> Despite these improvements in humanitarian protections for noncombatants in internal armed conflicts, many delegates were disappointed with Protocol II.<sup>37</sup> The main weakness is the high threshold of armed conflict necessary before Protocol II applies. At the Diplomatic Conference in 1973, the International Committee of the Red Cross (ICRC), as well as many delegates, wanted Protocol II to cover all conflicts covered by Common Article 3 of the Geneva Conventions.<sup>38</sup> This position met strong opposition from states that preferred to handle in-

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<sup>32</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I, opened for signature Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391; Protocol II, *supra* note 1.

<sup>33</sup>Protocol I, however, has been criticized for including within its definition of conflicts governed by the international law of war all "armed conflicts in which people are fighting against colonial domination and against racist regimes in the exercise of the rights of self-determination." Protocol I, *supra* note 32, art. 1(4); *see Baxter, Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 *Harvard Int'l L.J.* 1 (1975); Fleiner-Gerster & Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 *Int'l & Comp. L.Q.* 267 (1985).

<sup>34</sup>Protocol II, *supra* note 1, art. 4. These generally include civilians, rebels who are out of combat because of wounds or illness, and captured rebels.

<sup>35</sup>*Id.* arts. 4, 9, 10, 13, 17, & 18.

<sup>36</sup>*Id.* arts. 5 & 6.

<sup>37</sup>The spokesman for the Norwegian delegation stated that Protocol II was a "seriously amputated version" of the original draft that the ICRC had presented to the Diplomatic Conference. The delegate of the Holy See also expressed disappointment at a text that was, he said, "a statement of good intentions devoid of any real humanitarian substance and of any mandatory character."

<sup>38</sup>The history and background of the four Diplomatic Conferences that produced Protocols I and II are covered in M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts* (1982) [hereinafter Bothe, *New Rules*]; Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 9 *Neth. Y.B. Int'l. L.* 107 (1978).

ternal matters without incurring any international obligations.<sup>39</sup> These states believed that such an application of Protocol II would endanger their sovereignty. As a result of this dispute, the threshold for Protocol II to apply is higher than that of Common Article 3. For Protocol II to apply to an internal armed conflict, the dissident armed forces must be under responsible command; they must exercise control over a part of the state's territory so as to enable them to carry out sustained and concerted military operations; and they must be able to implement Protocol II.<sup>40</sup> Most internal conflicts take many years to reach this level, and, even if the threshold is crossed, governments are not likely to admit it except in the most obvious situations.

Despite this weakness, Protocol II was signed by the United States in 1977 and now, ten years later, it has been submitted for ratification with one reservation, two understandings, and one declaration. This article will not review the eighteen substantive provisions of the Protocol. Rather, it will analyze those provisions that are subject to a reservation, understanding, or declaration by the Executive Branch.<sup>41</sup> The article will also examine whether any other reservations or understandings should be made by the United States.

## IV. THE RESERVATION, UNDERSTANDINGS, AND DECLARATION TO PROTOCOL II

### A. *THE FIELD OF APPLICATION*

The most significant Executive Branch recommendation is a declaration relating to Protocol II's field of application. It declares that the United States will apply Protocol II to all internal armed conflicts covered by Common Article 3 and encourage all other states to do likewise.<sup>42</sup> The reasons for this proposal were explained in a State Department report to the President regarding Protocol II:

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and

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<sup>39</sup>The divergence of opinions at the Diplomatic Conference regarding the field of application for Protocol II is summarized in Bothe, *New Rules*, *supra* note 38, at 624.

<sup>40</sup>Protocol II, *supra* note 1, art. 1.

<sup>41</sup>The proposed reservations and understandings to Protocol II, and the reasons for these recommendations, are set forth in a State Department Report submitted to President Reagan. This Report is printed in S. Treaty Doc. No. 2, 100th Cong., 1st Sess. (1987) [hereinafter *State Department Report*].

<sup>42</sup>State Department Report, *supra* note 41, at 7.



exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that **U.S.** ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but no internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.<sup>43</sup>

The United States and many other states believe that the field of application of Common Article 3 is broader than that of Protocol II. The scope of Article 3 is considered broader because its application is not contingent upon dissident armed forces exercising control over part of the territory or carrying out sustained and concerted military operations. Common Article 3 states that its provisions apply to all "armed conflict[s] not of an international character."<sup>44</sup> This vague language, however, is not defined clearly in the text of the article or in its drafting history. The ICRC Commentary states that the conflicts referred to in Article 3 are armed conflicts "which are in many respects similar to an international war, but take place in the confines of a single country".<sup>45</sup> This general definition of noninternational armed conflict is susceptible to various interpretations. At the diplomatic conference, some delegates expressed the view that state practice would effectively raise the threshold of Common Article 3 "upwards," giving that article the same field of application as Protocol II.<sup>46</sup> A large number of nations, however, including the United States, have always maintained that Common Article 3 cannot be construed so narrowly. The proposed declaration to Protocol II reaffirms the broader application of Common Article 3.

Many states would reject this declaration to Protocol II, again because they do not want international obligations interfering with

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<sup>43</sup>Letter of Submittal from Secretary of State George Schultz to President Reagan, in State Department Report, *supra* note 41, at vii.

<sup>44</sup>Geneva Conventions, *supra* note 4, art. 3.

<sup>45</sup>See Pictet, *supra* note 26, at 37.

<sup>46</sup>This view was expressed only in private and not officially at the Conference. See Forsythe, *supra* note 30, at 286.

their internal affairs.<sup>47</sup> Nevertheless, the declaration is a step forward for international humanitarian law. Protocol II has tremendous normative value and its application should not be limited by the high threshold requirements. Protocol II should be applied to all conflicts covered by Common Article 3, because then the increased humanitarian protections of Protocol II would apply to a wider range of internal armed conflicts. Some states might reject this interpretation, but other governments may follow the United States' lead. For these reasons the proposed declaration to Protocol II is a commendable attempt to advance the rules of international humanitarian law.

## ***B. ARTICLE 10: THE PROTECTION OF MEDICAL DUTIES***

Article 10 deals with the protection of all those engaged in medical activities. It contains the following provisions:

### **Article 10—General protection of medical duties**

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefitting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.<sup>48</sup>

The term “persons engaged in medical activities” is used to cover all persons who are directly engaged in treatment and diagnosis of patients. This includes doctors, nurses, laboratory assistants, and even some members of the administrative staff who have direct contact

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<sup>47</sup>The resistance by states of a wider application of Protocol II is summarized in Bothe, New Rules, *supra* note 38, at 624.

<sup>48</sup>Protocol II, *supra* note 1, art. 10.

with the patient.<sup>49</sup> Paragraphs one and two essentially copy the first two provisions of Article 16 in Protocol I. The central concept in these provisions is that of “medical ethics”. Medical ethics is not defined in either Protocol, but, according to the ICRC Commentary, the phrase refers to the “moral duties incumbent upon the medical profession”.<sup>50</sup> There has been progress in the field of international standards for medical ethics, but many rules still vary from state to state. The concept has therefore remained within the various national systems.

The second paragraph of Article 10 refers to the rules of medical ethics and “other rules designed for the benefit of the wounded and sick.”<sup>51</sup> In some states the concept of medical ethics applies only to doctors and nurses. Other people who treat patients must follow separate standards. The expression “other rules” in the second subparagraph to Article 10 was intended to cover these additional standard. The words “designed for the benefit of the wounded and sick” were included to exclude rules that are not relevant to medical treatment.<sup>53</sup>

The third and fourth provisions of Article 10 protect medical personnel from divulging information that was acquired while performing their duties. These rights, however, are subject to national law, which means that governments can deviate from these obligations if the state’s law permits.

The Executive Branch has proposed the following reservation to Article 10: “The United States reserves as to Article 10 to the extent that it would affect the internal administration of the United States Armed Forces, including the administration of military justice.”<sup>54</sup>

The proposed reservation relates to paragraphs one and two because these are the two provisions that concern “medical ethics.” The State Department contends that the reservation is necessary “to preserve the ability of the U.S. Armed Forces to control actions of their medical personnel, who might otherwise feel entitled to invoke these provisions to disregard, under the guise of ‘medical ethics,’ the priorities and restrictions established by higher authority.”<sup>55</sup> The main concern

<sup>49</sup>See Bothe, *New Rules*, *supra* note 38, at 127.

<sup>50</sup>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 200 (J. Pictet ed. 1987) [hereinafter Pictet, *Additional Protocols*].

<sup>51</sup>Protocol II, *supra* note 1, art. 10 (2).

<sup>52</sup>Article 16 of Protocol I uses the words “other medical rules”, while Article 10 of Protocol II simply refers to “other rules”. The different language in Article 10 most likely reflects a condensed version of Article 16, rather than an intentional change in substantive meaning.

<sup>53</sup>See Bothe, *New Rules*, *supra* note 38, at 129.

<sup>54</sup>State Department Report, *supra* note 41, at 7.

<sup>55</sup>*Id.*

is that, if Article 10 is adopted without this reservation, military medical personnel might cite medical ethics as an excuse to refuse to perform their military duties or to disregard established treatment priorities and methods.<sup>56</sup> The case of *United States v. Levy*<sup>57</sup> provides an example of the potential problem. Captain Levy was an Army doctor who was court-martialed for disobeying an order to train Green Beret paramedics. At trial, he asserted that the order violated a rule of medical ethics that prohibited training unqualified personnel to perform treatment that should be done by a physician.<sup>58</sup> This defense failed as a matter of law because the court held that medical ethics do not excuse disobedience of the orders of a superior.<sup>59</sup>

If Congress ratifies Protocol II, it would then become the supreme law of the land.<sup>60</sup> Consequently, if the provisions of Protocol II are self-executing, they would take precedence over any conflicting military rules or regulations.<sup>61</sup> Article 10 would then require a military court to hear Captain Levy's affirmative defense. The defense would not succeed unless the order violated a rule of medical ethics and unless that rule was designed for the benefit of the wounded and sick. In addition, the defense would only be available during a noninternational armed conflict.

Another concern of the State Department is that the term "medical ethics" would be determined by unknown international principles.<sup>62</sup> In its report on Protocol II, the State Department explains that the

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<sup>56</sup>*Id.*

<sup>57</sup>39 C.M.R. 672 (1968); see *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>58</sup>39 C.M.R. at 676.

<sup>59</sup>*Id.* at 677.

<sup>60</sup>In *The Head Money Cases*, 112 U.S. 580 (1884), Justice Miller outlined the relationship between treaty obligations and U.S. law:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizens or subjects may be determined.

112 U.S. at 598–99. The question whether a treaty is self-executing is a matter of interpretation for the courts. Restatement (Second) of Foreign Relations Law of the United States § 154(1) (1965).

"Service members are subject to the Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1982).

<sup>62</sup>The State Department Report states the following: "But for a few general principles established in war crimes tribunals after World War II, there is no internationally agreed legal definition of 'medical ethics.' Use of the concept in this context therefore invites political manipulation." State Department Report, *supra* note 43, at 5.

concept of medical ethics "invited Political manipulation" because there are no internationally accepted rules of medical ethics.<sup>63</sup> At first glance, the State Department's concern regarding Article 10 from this standpoint seems unwarranted. The Commentary to Protocol II by Bothe, Partsch, and Solf states that medical ethics are determined by reference to national rules, rather than international norms.<sup>64</sup> The ICRC Commentary to Protocol II affirms that medical ethics are decreed by the medical corps of each State in the form of professional duties.<sup>65</sup> The commentary further explains, however, that the World Medical Association has adopted rules governing medical ethics,<sup>66</sup> and that these rules are the ones referred to in Article 10.<sup>67</sup> Under this interpretation of Article 10, the concept of medical ethics is determined by international regulations that have not necessarily reached the status of customary international law. Although the rules are not disputed by the United States, the State Department's concern for future political manipulation is not unfounded. To avoid this problem, the United States could state an understanding that medical ethics under Article 10 will be determined by national rules. International standards for medical ethics would therefore not govern unless they were adopted by treaty or gained the status of customary international law.

### ***C. ARTICLE 16: THE PROTECTION OF CULTURAL AND RELIGIOUS OBJECTS***

Article 16 is intended to protect cultural objects and places of worship from acts of hostility and to prohibit their use in support of the military effort. The Article provides:

Article 16—Protection of cultural objects and places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit

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<sup>63</sup>*Id.*

<sup>64</sup>See Bothe, New Rules, *supra* note 38, at 128; Commentaire des Protocoles Additionnels du 8 juin 1977 aux Convention de Geneve du 12 aout 1949, at 191 (J. Pictet ed. 1986).

<sup>65</sup>See Pictet, Additional Protocols, *supra* note 50, at 200.

<sup>66</sup>The World Medical Association is made up of one medical association in each country and has about 700,000 members. The Association has adopted an "International Code of Medical Ethics" (1949), the "Declaration of Geneva" (1948), "Regulations in Time of Armed Conflict," and the "Rules Governing the Care of Sick and Wounded, Particularly in Time of Conflict." The text of the latter two documents is contained in Pictet, Additional Protocols, *supra* note 50, at 201 nn. 11, 12.

<sup>67</sup>See Pictet, Additional Protocols, *supra* note 50, at 201.

any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.<sup>68</sup>

The reference to the Hague Convention<sup>69</sup> clarifies that the Convention's application is not modified by the Protocol.<sup>70</sup> Nevertheless, there are differences between the two conventions. First, the Hague Convention protects a wide range of cultural property, while Article 16 only covers objects that are recognized as part of the cultural and spiritual heritage of peoples.<sup>71</sup> The Hague Convention expressly prohibits any acts of reprisal against cultural property, while Protocol II does not.<sup>72</sup> The most important distinction, however, concerns the conditions that would cause cultural property to lose its protection. The Hague Convention allows a state to disregard the obligation to respect cultural property "where military necessity requires such a waiver."<sup>73</sup> Article 16 does not contain any similar clause. This distinction leads to different obligations under Article 16 depending upon whether a state has ratified the 1954 Hague Convention. A party to the Hague Convention is released from the obligations of Article 16 in cases of imperative military necessity, because Article 16 does not prejudice the rules of the Hague Convention. On the other hand, a nonparty to the Hague Convention does not have the express right to disregard the obligations of Article 16 under any circumstances. For this reason, the commentary to Protocol II by Bothe, Partsch, and Solf suggests that nonparties to the Hague Convention "reserve the right to waive the provisions of the obligations under Article 16 to the same extent as those obligations may be waived by States which are Parties to the Hague Convention."<sup>74</sup>

The United States has signed but not ratified the Hague Convention of 1954. Consequently, the Executive Branch has recommended that Article 16 be subject to the following understanding:

2. The United States understands that Article 16 establishes a special protection for a limited class of objects that,

<sup>68</sup>Protocol I, *supra* note 32, art. 16.

<sup>69</sup>Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, *reprinted in* The Laws of Armed Conflict 657 (D. Schindler & J. Toman eds. 1981) [hereinafter Hague Convention of 1954].

<sup>70</sup>Article 19 of the 1954 Hague Convention is expressly applicable to armed conflicts not of an international character. This article requires that each party to such conflict apply, as a minimum, the provisions of the Convention "which relate to respect for cultural property."

<sup>71</sup>Hague Convention of 1954, *supra* note 69, art. 1.

<sup>72</sup>*Id.* art. 4(4).

<sup>73</sup>*Id.* art. 4(2).

<sup>74</sup>Bothe, New Rules, *supra* note 38, at 688.

because of their recognized importance, constitute a part of the cultural or spiritual heritage of people, and that such objects will lose their protection if they are used in support of the military effort.<sup>75</sup>

The first part of this understanding reaffirms that Article 16 provides protection only to a limited class of cultural property that has been recognized as a part of the cultural and spiritual heritage of peoples. This understanding probably was recommended to clarify that Article 16 does not make a state responsible under Protocol II for protecting the same broad scope of cultural property included within the coverage of the Hague Convention. This understanding is consistent with the language of Article 16 and its drafting history.

The second part of the understanding is that the objects covered by Article 16 lose their protection if they are used in support of the military effort. The United States must expressly reserve the right to waive the protections of Article 16, because it is not a party to the Hague Convention of 1954. The understanding, however, is not consistent with the Hague Convention of 1954 or the drafting history of Article 16. The understanding draws upon two of the Hague Conventions of 1907,<sup>76</sup> which are binding on all nations during international armed conflict as customary international law.<sup>77</sup> The Hague Convention of 1954, however, increased the protection afforded cultural property by permitting waiver only in cases of imperative necessity.<sup>78</sup> If cultural objects are used in support of the military effort, this violates the Hague Convention of 1954, but it does not necessarily justify attacking them. The proposed understanding is therefore consistent with customary international law, but is broader than that permitted under the Hague Convention of 1954.

The text of Article 16 does not support this broad waiver provision. The use of cultural property in support of the military effort is prohibited by Article 16, but the provision does not state that such use causes the object to lose its protection. Article 16 was adopted without prejudice to the 1954 Hague Convention so that states could derogate

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<sup>75</sup>State Department Report, *supra* note 41, at 7.

<sup>76</sup>See 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. Oct. 18. 1907, art. 27, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631; and Convention Concerning Bombardment by Naval Forces in Time of War, art. 5. Oct. 18. 1907, 36 Stat. 2351. T.S. No. 542, 1 Bevans 681.

<sup>77</sup>The general principles of the 1907 Hague Convention No. IV have been accepted as customary international law, to which all states are subject. See Dep't of the Army. Field Manual No. 27-10. The Law of Land Warfare, paras. 5-7 (1956); M. McDougal and F. Feliciano. Law and Minimum World Public Order, at 541 n.48 (1961).

<sup>78</sup>Hague Convention of 1954. *supra* note 69, art. 4(2).

from its standards in cases of imperative military necessity.<sup>79</sup> If the United States reserved the right to waive the protections of Article 16 to the same extent as provided in the Hague Convention, this reservation would be consistent with the intended application of Article 16. The proposed waiver provision, however, is broader than that allowed under the Hague Convention of 1954. For this reason, the recommended “understanding” to Article 16 must be understood as a reservation that changes the obligations under the Article.

### ***D. THE SCOPE OF OBLIGATIONS ARISING FROM PROTOCOL II***

The United States sends economic and military assistance to governments or insurgents in various states that are involved in internal conflicts. The obligations arising under Protocol II from this type of involvement in internal conflicts raise an important question that the second proposed understanding to Protocol II addresses:

3. The United States understands that when a High Contracting Party provides assistance to a State whose armed forces are engaged in a conflict of the type described in Article 1(1), any obligations which may arise for that High Contracting Party pursuant to this Protocol will not in any event exceed those assumed by the State being assisted. However, such a High Contracting Party must comply with the Protocol with respect to all operations conducted by its armed forces, and the United States will encourage all States to whom it provides assistance to do likewise.<sup>80</sup>

The humanitarian obligations a state assumes by assisting a party to an armed internal conflict were discussed in *Military and Paramilitary Activities in and against Nicaragua*.<sup>81</sup> In this case before the International Court of Justice, the government of Nicaragua alleged that the United States was responsible for violations of the law of war committed by the contras because it provided assistance to them. The Court rejected this argument.<sup>82</sup> It held that, in order to impute the contras’ activities to the United States, Nicaragua had to prove that the United States had effective control of the contra’s military

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<sup>79</sup>It was proposed at the Diplomatic Conference of Protocol II that the reference to the Hague Convention of 1954 be deleted from Article 16. An argument for retention of the reference was to preserve the waiver provision inherent in the Hague Convention. See Bothe, New Rules, *supra* note 38, at 689.

<sup>80</sup>State Department Report, *supra* note 41, at 7.

<sup>81</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. Rep. 14 (Judgment of June 27).

<sup>82</sup>1986 I.C.J. Rep. at 65, para. 116.



operations when the alleged violations were committed.<sup>83</sup> This was not proven, so the Court refused to consider the alleged violations of humanitarian law by the *contras*.<sup>84</sup>

Nicaragua also alleged that certain acts by the United States violated fundamental principles of humanitarian law. One of those acts was providing the *contras* with a manual entitled "*Operaciones psicológicas en guerra de guerrillos*" (Psychological Operations in Guerrilla Warfare). The court stated that the United States has an obligation under Article 1 of the Geneva Conventions to "respect" and "ensure respect" of the Conventions "under any circumstances."<sup>85</sup> This obligation was found to derive not only from the Convention, but also from general principles of humanitarian law.<sup>86</sup> The court also considered the provisions of Common Article 3 to be the minimum humanitarian principles applicable to the conflict between the *contras* and the government of Nicaragua.<sup>87</sup> The United States was thus under an obligation "not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."<sup>88</sup> It was established that the manual of psychological operation was prepared by the Central Intelligence Agency and distributed to the *contras*.<sup>89</sup> The court found that certain provisions in this manual were contrary to the prohibitions in Common Article 3,<sup>90</sup> and therefore regarded the publication and dissemination of the manual as encouragement to commit acts contrary to Common Article 3 and general principles of international humanitarian law.<sup>91</sup>

The *Nicaragua* case involved a state's assistance to insurgents, but the court's analysis should be the same for a state that assists the government party to an internal armed conflict. The decision of the International Court of Justice did not rest upon the fact that the United States was assisting insurgents rather than the government. For this reason, it is important to know if the proposed understanding to Protocol II is consistent with the decision in *Military and Paramilitary Activities in and Against Nicaragua*.<sup>92</sup>

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<sup>83</sup>*Id.* at 64–65, para. 115.

<sup>84</sup>*Id.* at 65, para. 116.

<sup>85</sup>*Id.* at 114, para. 220.

<sup>86</sup>The question whether there is an obligation deriving from the general principles of international law not to "encourage" violations of humanitarian law is addressed in Meron, *The Geneva Conventions as Customary Law*, 81 *Amer. J. Int'l L.* 348, 352 (1987).

<sup>87</sup>1986 I.C.J. Rep. at 114, para. 219.

<sup>88</sup>*Id.* at 114, para. 220.

<sup>89</sup>*Id.* at 66, para. 118.

<sup>90</sup>*Id.* at 130, para. 255.

<sup>91</sup>*Id.* at 130, para. 256.

<sup>92</sup>See *supra* note 81.

The first sentence of the understanding establishes that the act of providing assistance to a state involved in an internal armed conflict does not make the High Contracting Party responsible for the acts of that state. This is in accord with the International Court of Justice decision regarding when acts may be impugned to a state.

The second sentence affirms that the United States will comply with the Protocol with respect to all operations conducted by its armed forces, and will encourage all states to whom it provides assistance to do likewise. The scope of respect required by Protocol II is not completely clear. A party to Protocol II must certainly “respect” its provisions, but there is no requirement in Protocol II that obligates the parties to “ensure respect” of it under any circumstances.<sup>93</sup> The decision in the *Nicaragua* case suggests that the general principles of international law obligate a party to ensure respect of humanitarian conventions. The duty not to encourage violations of Protocol II is also supported by the principles of good faith and *pacta sunt servanda*.<sup>94</sup> A final determination of this issue, however, is not required for this analysis because the State Department has recommended that the United States encourage all states to which it provides assistance to comply with the Protocol. This positive duty to encourage compliance by other states is broader than the obligation under Article 1 of the Geneva Conventions and is consistent with general principles of international humanitarian law.<sup>95</sup>

## V. PROTOCOL II AND THE HUMANITARIAN RULES GOVERNING INTERNATIONAL ARMED CONFLICT

The final issue for analysis is whether any other reservations or understandings should be made to Protocol II. The protections in Protocol II are minimal in comparison with the humanitarian laws governing the United States during an international armed conflict. This does not mean that the standards in Protocol II correspond to the rules governing international armed conflict. Protocol II is largely a compilation of the most fundamental humanitarian protections in

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<sup>93</sup>Since Protocol II does not expressly require parties to “ensure respect” of the Convention, such an obligation must be based, if at all, upon customary international law. The scope of duty imposed by customary international law to humanitarian instruments is analyzed in Meron, *supra* note 86, at 354–55.

<sup>94</sup>See Meron, *supra* note 86, at 354–55.

<sup>95</sup>In the *Nicaragua* case, the International Court of Justice defined the United States’ obligation as a negative duty “not to encourage” violations of Common Article 3. The Executive Branch seeks to impose a positive duty on the United States to encourage compliance, which goes beyond the requirements of the *Nicaragua* judgment.

Protocol I, which the United States will not ratify.<sup>96</sup> Two articles in Protocol II are taken from provisions in Protocol I that change or modify the existing customary or treaty law governing international armed conflict. These two articles will be analyzed in light of the U.S. obligations during noninternational armed conflict to determine whether Protocol II imposes a greater obligation on the United States than it faces during international armed conflict.

### ***A. ARTICLE 14: PROTECTION OF OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION***

Article 14 of Protocol II prohibits the starvation of civilians as a method of combat. It provides:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for the purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.<sup>97</sup>

This Article is a more concise formulation of Article 54(1) b(2) of Protocol I, which states:

Article 54—Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

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<sup>96</sup>The reasons for not seeking ratification of Protocol I are summarized in the State Department Report submitted to President Reagan, *supra* note 41, at IX–X. The arguments against ratification of Protocol I are persuasively made by Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l. L. 109 (1985).

<sup>97</sup>Protocol II, *supra* note 1, art. 14.

(a) as sustenance solely for the members of its armed forces;  
or

(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the objects of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.<sup>98</sup>

Article 54 has been considered a “significant new principle of international law.”<sup>99</sup> The traditional rule and practice under international law is that “it is lawful to starve the hostile belligerent, armed or unarmed, if it leads to the speedier subjection of the enemy.”<sup>100</sup> This rule, set forth in the Lieber Code, justified the naval blockade of the South during the American Civil War and the Allied blockades against Germany in World War I and World War II.<sup>101</sup> The rule is subject to the requirement that only the imperative demands of war justify the destruction or seizure of the enemy’s property,<sup>102</sup> and also to the principle of proportionality, which requires that the loss of life and damage to property not be out of proportion to the military advantage to be gained. This principle, for example, would be violated if a blockade or siege is done for the primary purpose of starving civilians, regardless of whether it leads to “the speedier subjection of the enemy.”

The underlying purpose of denial actions against objects having sustenance value is to weaken the adversary’s armed forces, but the actual effect tends to diminish substantially the resources available to civilian noncombatants. This occurs because the highest priority of available sustenance material usually is assigned to combatants rather than civilians. For this reason, Article 54 was carefully drafted to prohibit actions that adversely affect either the civilian population

<sup>98</sup> Protocol I, *supra* note 32, art. 54.

<sup>99</sup> See Roberts, *supra* note 92, at 153.

<sup>100</sup> Lieber Code, *supra* note 14, art. 17; Bothe, New Rules, *supra* note 38, at 336.

<sup>101</sup> See Roberts, *supra* note 96, at 154 n.235.

<sup>102</sup> See 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23(g), 36 Stat. 2277, T.S. No. 539.

alone, or a combination of the adverse party's forces and the civilian population. Paragraph 2 of Article 54 states that hostile acts on objects indispensable to the civilian population are prohibited "whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."<sup>103</sup> Denial actions are permitted only when it can be shown that such denial would affect the adverse party's armed forces exclusively.<sup>104</sup>

Article 14 of Protocol II corresponds with Article 54, but it does not provide the same protection to civilians. The starvation of civilians as a method of combat is forbidden by Article 14, but the scope of prohibition is much narrower than Article 54. The prohibitions in Article 14 apply only if the purpose of the action is to starve the civilians. An attack on objects indispensable to civilian survival would not be prohibited if the purpose is to weaken an adversary's armed forces. This prohibition is extremely narrow and provides less protection than the customary rules governing international armed conflict. The article can be interpreted more broadly if one assumes that the Marten's clause of the Preamble requires the application of the principle of proportionality.<sup>105</sup> This principle would restrict denial actions against objects having sustenance value for both the armed forces and the civilian population to those whose effects on civilians are not disproportionate to the military advantage anticipated. This protection, however, would still be no broader than the current rules governing the United States during international armed conflicts.

## ***B. ARTICLE 15: PROTECTION OF WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES***

Article 15 of Protocol II corresponds with Article 56 in Protocol I, which covers the protection of works and installations containing dangerous forces. Article 56 generally bans attacks on dams, dikes, and nuclear power stations, "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."<sup>106</sup> This special protection ceases only if the installation is used in "regular, significant and direct support of the military effort" and an attack is the only feasible way to terminate such support.<sup>107</sup>

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<sup>103</sup>Protocol I, *supra* note 32, art 54(2)

<sup>104</sup>See Bothe, New Rules, *supra* note 38, at 678

<sup>105</sup>The Marten's clause in Protocol II deletes the reference to the law of nations. The reason for this deletion is discussed in Bothe, New Rules, *supra* note 38, at 620

<sup>106</sup>Protocol I, *supra* note 32, art 56(1)

<sup>107</sup>*Id.* art 56(2)

The State Department does not support the provisions of Article 56 concerning the protection of dams, dikes, and nuclear power stations.<sup>108</sup> These rules are not accepted because they restrict attacks against what traditionally have been considered legitimate military targets. Under customary international law, installations may be attacked if they have military value and the loss is not disproportionate to the military gain anticipated.<sup>109</sup> Article 56 makes clear that if severe civilian loss will result, the loss cannot be balanced against the military value of the target.

Article 15 of Protocol II is identical to the first sentence of Article 56, and provides unqualified immunity for dams, dikes, and nuclear power plants. "Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."'' The protection of the installations under Article 15 is extremely broad; there are no conditions that limit its application. The rule also differs significantly from the customary rules applicable to international armed conflict and is contrary to the position taken by the State Department concerning Article 56 of Protocol I.<sup>111</sup> Some type of reservation or understanding seems appropriate for Article 15. For example, Article 15 reasonably could be limited by reserving the right to waive its special protections in situations stated in Article 56, paragraph 2, i.e., when an installation is used for other than its normal function and in regular, significant, and direct support of military operations. If the Senate ratifies Protocol II without a reservation to Article 15, the United States will have to comply with the unqualified protections of Article 15 during internal conflicts, and will be obligated to encourage all states to whom it provides assistance to do likewise.<sup>112</sup>

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<sup>108</sup> See Matheson, *U.S. Position On the Relations of Customary International Law To The 1977 Additional Protocols*, Workshop on International Humanitarian Law, Washington College of Law, January 22, 1987.

<sup>109</sup> See Roberts, *supra* note 96, at 156.

<sup>110</sup> Article 15 of Protocol II states:

Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

''See Matheson, *supra* note 108, at 15.

<sup>112</sup> The obligation to encourage compliance would arise from the Executive Branch's second understanding to Protocol II, *supra* note 80.

## VI. CONCLUSION

Protocol II significantly advances the standards of humanitarian law in an area that is plagued with human rights violations. The ratification of Protocol II would reaffirm the historical commitment of the United States to improving and codifying the laws governing internal armed conflict. Accession to Protocol II would also give the Convention greater recognition and likely would influence other countries to seek ratification. The Executive Branch proposes that the United States apply the Protocol to all conflicts covered by Common Article 3 and encourage all other States to do likewise. This recommendation improves upon Protocol II because it broadens the Convention's field of application. The proposal also would have the United States encourage all States to whom it provides assistance to comply with the Convention. This understanding is also a positive commitment to Protocol II and is consistent with international humanitarian law.

The recommended reservations to Article 10 and Article 16 limit the protections in these provisions. The reservation to Article 10 would exclude its application to the extent that it would affect the internal administration of the United States Armed Forces. The most significant effect of this proposal is that it preserves the U.S. doctrine that the rules of medical ethics cannot be invoked as an excuse for disobedience of the orders of a superior.<sup>113</sup> The proposed understanding to Article 16 is that the cultural objects safeguarded under this article lose their protection if they are used in support of the military effort. This loss of protection clause is broader than that contemplated in the adoption of Article 16.

The Executive Branch has not recommended any reservation to Article 15, which protects installations containing dangerous forces. The Article contains no waiver provision, and its principle is contrary to the laws governing the United States during international armed conflicts. Some type of reservation by the United States would seem appropriate for this article.

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<sup>113</sup>See *United States v. Levy*, 39 C.M.R. 672 (1968).

# THE RIGHT TO A FAIR TRIAL IN CRIMINAL CASES INVOLVING THE INTRODUCTION OF CLASSIFIED INFORMATION

by Major Christopher M. Maher\*

## I. INTRODUCTION

In the military, offenses involving the introduction of classified information<sup>1</sup> are tried using special procedures.<sup>2</sup> This article examines the fairness of the unique procedures applicable to classified information cases.

These cases frequently become the focus of attention in the press.<sup>3</sup> Often involving espionage, they arouse curiosity, and then anger. Because of the threat posed to national security, espionage and related offenses carry with them the maximum penalty of death.<sup>4</sup> Confinement for life and sentences of twenty years are not uncommon.<sup>5</sup> As a result, counsel often find themselves under the magnifying glass of official and public scrutiny.

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<sup>1</sup>Military Rule of Evidence 505 defines classified information as "any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security, and any restricted data as defined in 42 U.S.C. Section 2014(y)." Mil. R. Evid. 505(b)(1). The rule further defines national security as "the national defense and foreign relations of the United States." *Id.* at (b)(2). See *infra* text accompanying notes 191–204.

<sup>2</sup>See Mil. R. Evid. 505.

<sup>3</sup>See, e.g., 2 *More Marines Linked to Fraternalizing – Lawmakers Say Loss to Spies at Embassy May Exceed Estimate*, The Washington Post, Apr. 4, 1987, at A1, col. 2.

<sup>4</sup>See 18 U.S.C. § 794 (1982) (Gathering or delivering defense information to aid foreign government); Uniform Code of Military Justice art. 104, 10 U.S.C. § 904 (1982) [hereinafter UCMJ] (Aiding the Enemy); UCMJ art. 106 (Spies); UCMJ art. 106a (Espionage); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

<sup>5</sup>*United States v. Walker*, 796 F.2d 43 (4th Cir. 1986) (life sentence); *United States v. Sobler*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962) (life sentence); *United States v. Johnson*, 15 M.J. 676 (A.F.C.M.R. 1983) (thirty year sentence); *United States v. Dobr*, 21 C.M.R. 451 (A.B.R. 1956) (twenty year sentence).



Despite all the public attention, little has been written on the procedures to follow when trying cases involving classified information.<sup>6</sup> This article will focus on the constitutional problems associated with government efforts to protect classified information from unauthorized disclosure while trying to use that information at trial.<sup>7</sup>

To guard classified information from unauthorized disclosure, the government may refuse to grant defense counsel a security clearance and access to classified information.<sup>8</sup> Second, the government may claim that the disclosure of classified information is privileged from disclosure.<sup>9</sup> Lastly, the government may seek to close sessions of the courts-martial from the public.<sup>10</sup>

On the other hand the accused is guaranteed the right to a fair trial. This includes the right to a speedy, public trial;<sup>11</sup> the right to effective assistance of counsel;<sup>12</sup> the right to discover evidence<sup>13</sup> and compel witnesses to testify for the defense;<sup>14</sup> and the right to testify in one's own behalf.

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<sup>6</sup>See Eisenberg, *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, *The Army Lawyer*, Mar. 1981, at 5; Woodruff, *Privileges Under the Military Rules of Evidence*, 92 *Mil. L. Rev.* 5, 31-52 (1981); Woodruff, *Practical Aspects of Trying Cases Involving Classified Information*, *The Army Lawyer*, June 1986, at 53.

<sup>7</sup>This article will not focus in any detail on the many practical problems associated with prosecuting classified cases. For example, the recording equipment used by many court reporters as well as automated transcription equipment may not be approved for use with classified information. See Dept. of Army, Reg. No. 380-380, Security—Automation Security, para. 1-20 (13 Mar. 1987) [hereinafter AR 380-380]. Also, finding secure facilities to prepare for and conduct trials is frequently a problem.

The total number of certain clearances and accesses is tightly regulated and centrally controlled. Getting scarce clearances for civilian and military can be a bureaucratic nightmare. See Dept. of Army, Reg. No. 604-5, Personnel Security Clearance—Department of Army Personnel Security Program (1 Feb. 1984) [hereinafter AR 604-5].

Intelligence agents, frequently trained in interrogation techniques and the fabrication of deceptive cover stories, can be convincing liars either as witnesses or accused. Where prosecutions relate to cover companies of the United States, locating undercover agents, financial records, and tracing the financial and intelligence activities of intelligence operations can be extraordinarily difficult. Frequent destruction of documentary evidence under the guise of operations security can further complicate investigations.

Lastly, coordination with compartmented intelligence activities and particularly non-Department of Defense intelligence activities can be remarkably frustrating.

<sup>8</sup>See *United States v. Nichols*, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

<sup>9</sup>*Mil. R. Evid.* 505.

<sup>10</sup>*Id.*

<sup>11</sup>U.S. Const. amend. VI; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 (Speedy Trial) [hereinafter R.C.M.]; R.C.M. 806 (Public Trial).

<sup>12</sup>*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>13</sup>R.C.M. 701 (Discovery); see *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Brady*, 373 U.S. 83 (1963).

<sup>14</sup>U.S. Const. amend. VI; R.C.M. 703 (Production of Witnesses and Evidence).

This article contends that existing procedures for the trial of criminal cases involving classified information are inadequate and unfair to both the accused and the government. In particular, the procedures leave substantial doubt as to whether an accused will receive a fair trial in cases involving classified information.

First, existing military precedent concerning granting *any* defense counsel access to classified information is unreasonable and should be judicially reversed.

Second, the notice requirement imposed on the defense by Military Rule of Evidence 505, "Classified Information," is constitutionally defective. This article proposes that the President amend the Rule to conform with the reciprocal disclosure requirements of the Classified Information Procedures Act.<sup>15</sup>

Third, while Military Rule of Evidence 505 appears to strike a balance between the interests of an accused soldier and the interest of the government in preserving state secrets, this balance is illusory. There is really no meaningful way for an accused soldier to challenge colorable claims of privilege or government motions to close the proceedings from the public for reasons of national security. Moreover, government use of ex parte, in camera affidavits to support claims of privilege and motions to close the proceedings make it unlikely that meaningful standards will develop. This article proposes prohibiting or drastically limiting the use of ex parte affidavits to support claims of privilege.

Lastly, to the extent classified information must be disclosed at trial, this article will examine the circumstances under which trials may be closed to the public. Keeping in mind that the Supreme Court has failed to address any of these issues in a criminal case, the article will necessarily focus on Military Rule of Evidence 505, "Classified Information," and its civilian counterpart, the Classified Information Procedures Act.

## **11. THE RIGHT TO COUNSEL AND ACCESS TO CLASSIFIED INFORMATION**

### **A. GENERAL**

The right to the assistance of defense counsel is an essential ingredient of a fair trial.<sup>16</sup> This right to counsel is an integral part of

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<sup>15</sup> 18 U.S.C. app. §§ 1–16(1982) (Classified Information Procedures Act) [hereinafter CIPA].

<sup>16</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932). The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

any court-martial.<sup>17</sup> In fact, accused soldiers enjoy far greater rights to defense counsel than do civilians similarly accused.<sup>18</sup> Irrespective of indigence, the Uniform Code of Military Justice guarantees accused soldiers the right to be represented by military defense counsel free of charge<sup>19</sup> or by civilian counsel provided by accused at no expense to the government.<sup>20</sup> Additionally, at general and special courts-martial, soldiers enjoy the Sixth Amendment right to counsel.<sup>21</sup> Thus, accused have the right to effective assistance of counsel at every stage of a prosecution,<sup>22</sup> including the right to have counsel present during questioning by military investigators.<sup>23</sup>

Yet, for the accused whose alleged misconduct relates to classified information, choosing a military or civilian counsel isn't quite that simple. Before the accused can disclose classified matters to a defense attorney, the accused must ensure that the attorney has the requisite personnel security clearance, and has been granted access.<sup>24</sup>

The granting of access is separate and distinct from the granting of a security clearance.<sup>25</sup> Generally, when the government determines that an individual can be trusted with classified information, an in-

<sup>17</sup>UCMJ art. 27.

<sup>18</sup>In the Army, this was not always the case. Prior to General Order 29 of 1890, the presence of defense counsel, military or civilian, was regarded as a privilege, not a right. W. Winthrop, *Military Law and Precedents* 166(2ded. 1896). [hereinafter Winthrop.] Moreover, professional counsel were at one time required to communicate with the court only in writing and they were prohibited from questioning witnesses orally. *Id.* In fact, not until 1 March 1917 were soldiers afforded a statutory right to defense counsel. Articles of War art. 16, ch. 418, 39 Stat. 650 (1916) (repealed 1950).

<sup>19</sup>The accused is entitled to military counsel either detailed pursuant to Article 27 or by reasonably available military counsel selected by the accused. UCMJ art. 27; R.C.M. 506(a). Whether a military counsel chosen by the accused is reasonably available is determined in accordance with Rule 506 (b)(1) and Army regulations. R.C.M. 506 (b)(1); Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-7 (18 Mar. 1988) [hereinafter AR 27-10].

<sup>20</sup>UCMJ art. 38(b).

<sup>21</sup>*United States v. Annis*, 5 M.J. 351 (C.M.A. 1978); *see also* *Henry v. Middendorf*, 425 U.S. 25 (1976) (sixth amendment right to counsel does not apply to summary courts-martial). Applicability of the sixth amendment right to counsel to soldiers is a recent development. *See* *United States v. Culp*, 14 C.M.A. 199, 33 C.M.R. 411 (1963) (sixth amendment right to counsel inapplicable to servicemembers); *United States v. Clay*, 1 C.M.A. 74, 1 C.M.R. 74 (1951) (right to be represented by counsel part of military due process).

<sup>22</sup>*Annis*, 5 M.J. at 353.

<sup>23</sup>UCMJ art. 31; *see* *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Tempia*, 16 C.M.A. 249, 37 C.M.R. 249 (1969); *United States v. Gunnels*, 8 C.M.A. 130, 23 C.M.R. 354 (1957).

<sup>24</sup>Dep't of Army, Reg. No. 380-5, Security: Department of the Army Information Security Program, para. 7-100 (1 Aug. 1983) [hereinafter AR 380-5].

<sup>25</sup>*Compare* Dep't of Army, Reg. No. 604-5, Personnel Security Clearance—Department of Army Personnel Security Program, para. 1-300 (1 Feb. 1984) [hereinafter AR 604-5] *with id.* para. 1-316.

dividual receives a security clearance.<sup>26</sup> Access is the opportunity or ability for individuals to obtain knowledge of classified information.<sup>27</sup> The commander concerned decides whether an individual's duties require access.<sup>28</sup>

Where an accused seeks the assistance of the United States Army Trial Defense Service, finding a counsel with the required clearances and access should not be too much of a problem. The Trial Defense Service will take steps to ensure that a counsel with the requisite clearances and access is made available for consultation or, in the event charges have been preferred, is detailed to represent the accused.

Similarly, where an accused requests individual military counsel, who has or is eligible for a security clearance and access, there again is little difficulty.<sup>29</sup> Tension between an accused's statutory and constitutional right to counsel of his own selection versus the interest of the government in protecting classified information develops when the accused selects a counsel who is a security risk.

## ***B. SELECTION OF DEFENSE COUNSEL WHO PRESENT A SECURITY RISK***

The possibility of an accused selecting a counsel who presents a security risk is indeed real. Depending on the clearance required to review the classified information, the defense attorney's background for the past fifteen years may be investigated.<sup>30</sup> Defense attorneys who have foreign citizenship,<sup>31</sup> spouses with foreign citizenship, or relatives in Vietnam or other Communist countries<sup>32</sup> may be denied a security clearance.<sup>33</sup> Also, those counsel who, while in college, took a year off to travel and had no permanent residence may likewise not receive a security clearance. Similarly, a defense counsel with a

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<sup>26</sup> AR 380-5, para. 7-101. There are three types of security clearances — confidential, secret, and top secret. AR 604-5, sec. 4.

<sup>27</sup> AR 604-5, para. 1-300.

<sup>28</sup> AR 380-5, para. 7-102. Where sensitive compartmented information is concerned, eligibility for access is determined by the Commander, U.S. Army Central Personnel Security Clearance Facility, or the Assistant Chief of Staff for Intelligence, Headquarters, Department of the Army. *Id.*, para. 7-102(d) & app. F.

<sup>29</sup> *But see supra* note 28.

<sup>30</sup> AR 380-5, para. 3-501 & app. C.

<sup>31</sup> *United States v. Soriano*, 9 M.J. 221 (C.M.A. 1980) (sailor sought to have Philippine lawyer represent him); *United States v. Harris*, 9 C.M.A. 493, 26 C.M.R. 273 (1958) (British solicitor represented Air Force sergeant); *United States v. Easter*, 40 C.M.R. 731 (A.C.M.R. 1969) (West German lawyer represented soldier); *United States v. George*, 35 C.M.R. 801 (A.F.B.R. 1965) (Philippine attorney represented airmen).

<sup>32</sup> *See* AR 604-5, app. H.

<sup>33</sup> *Id.* app. I-3.

poor credit rating or deeply in debt may be deemed a security risk.<sup>34</sup> Of course, any history of mental illness, drug or alcohol problems, past or present affiliations with homosexuals, or certain subversive organizations can result in denial of a security clearance.<sup>35</sup> In view of the detailed investigation conducted in connection with getting a security clearance, it is indeed possible that an accused might select a counsel whose request for a security clearance would be denied. Moreover, to force the issue, accused might intentionally choose to associate civilian or individual military counsel who won't be cleared.

This brings us back to the question, what about the accused's right to counsel? At first blush, the plain answer would seem to be that the government should not be required to grant a clearance to just any attorney selected by the accused. By regulation no one is entitled to a clearance regardless of his position or duties.<sup>36</sup> Only a few courts have addressed the issue.

In *United States v. Jolliff*,<sup>37</sup> tried under the Classified Information Procedures Act,<sup>38</sup> the defense objected to being required to have counsel submit to the security clearance process. The district court declined to address the defense's due process objection to the clearance process, holding that the accused could not assert due process objections on behalf of his defense counsel.<sup>39</sup> While declaring that it had not interfered with defendant's sixth amendment right to counsel by requiring defense counsel to submit a request for a security clearance, the court observed that the act did not provide the court with the authority to make submission to a security clearance a prerequisite to representing a defendant in a case involving classified information.<sup>40</sup> The court went on to comment: "Although the Sixth Amendment grants an accused an absolute right to have assistance of counsel, it does not follow that his right to a particular counsel is absolute."<sup>41</sup> Thus, *Jolliff* supports the proposition that the government need not grant a security clearance and access to any defense counsel selected by accused.

Yet, under existing military case law, the defense can fairly argue that not withstanding defense counsel's lack of a clearance, the ac-

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<sup>34</sup>*Id.* app. I-1.

<sup>35</sup>Presumably, as the member of a bar, defense counsel will not have criminal convictions resulting in denial of a clearance.

<sup>36</sup>AR 604-5, para. 2-100(b).

<sup>37</sup>548 F.Supp. 227 (D. Md. 1981).

<sup>38</sup>18 U.S.C. app. §§ 1-16(1982) (CIPA).

<sup>39</sup>*Jolliff*, 548 F.Supp. at 233.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 231.

cused is entitled to have his defense counsel present at all proceedings even when classified material is presented.<sup>42</sup>

In *United States v. Nichols*, the Court of Military Appeals held that “the accused’s right to a civilian attorney of his own choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter.”<sup>43</sup> Noting that Congress could have explicitly required civilian counsel to meet certain qualifications before appearing at courts-martial, the court also held “that the Uniform Code imposed no qualifications upon a civilian lawyer’s right to practice in courts-martial.”<sup>44</sup> In dicta, the court suggested that hearings might be held to disbar counsel from practice before courts-martial, but that the government would have the burden of proving that the defense counsel was disqualified to appear before courts-martial.<sup>45</sup>

Citing Judge Learned Hand’s opinion in *United States v. Andolschek*<sup>46</sup>, the Court of Military Appeals left the government with three options: grant access and allow the defense counsel to represent the accused, defer proceeding against the accused, or disbar the defense counsel from practice before courts-martial.<sup>47</sup>

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial expressly disqualify counsel unable to secure a clearance and access in cases involving classified information. Individual military or civilian defense counsel are qualified to practice before courts-martial if they are members of a bar of a federal court or the highest court of a state.<sup>48</sup> In cases where an accused retains a foreign attorney, that attorney must be authorized by a recognized licensing authority to practice law, and the attorney must demonstrate that the attorney has the appropriate training and familiarity with general principals of criminal law applicable to courts-martial.<sup>49</sup>

While a number of grounds for disqualification have developed as a result of provisions in the Uniform Code and decisions of the Court of Military Appeals,<sup>50</sup> no clear judicial rule has developed since *Nichols* for counsel in cases involving classified information. By reg-

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<sup>42</sup>*United States v. Nichols*, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

<sup>43</sup>*Id.* at 125-26, 23 C.M.R. at 349.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>142 F.2d 503 (2d Cir. 1944).

<sup>47</sup>*Nichols*, 23 C.M.R. at 349.

<sup>48</sup>R.C.M. 502(d)(3)(A).

<sup>49</sup>R.C.M. 502(d)(3)(B).

<sup>50</sup>*See United States v. Lovett*, 7 C.M.A. 704, 23 C.M.R. 168 (1957) (lawyers representing multiple accused are disqualified where conflict exists among accused); UCMJ art. 27 (a lawyer cannot have acted for both the government and the defense in the same case).

ulation, the Army has endeavored to prevent counsel who are security risks from participating in cases involving classified information.<sup>51</sup>

Each Judge Advocate General can suspend attorneys, including civilians, from practicing before courts-martial for violating rules of conduct prescribed by the Judge Advocate General.<sup>52</sup> By regulation, The Judge Advocate General for the Army has adopted the Army Rules of Professional Conduct.<sup>53</sup> As well as repeated and flagrant violations of this code,<sup>54</sup> grounds for suspension of counsel include representing a soldier in a case involving classified information when counsel is a security risk.<sup>55</sup> Procedures for suspending counsel include notice and the opportunity to be heard.<sup>56</sup> There is, however, no indication of who has the burden of proof.<sup>57</sup>

A diligent search of the case law fails to reveal any challenges to the validity of this suspension procedure. Nevertheless, in cases involving security, the defense can fairly argue that disbarment of counsel for failure to obtain a security clearance pursuant to Army regulations is tantamount to limiting the accused's right to counsel of his own choice "by a service-imposed obligation to obtain clearance for access to service classified matter."<sup>58</sup> This is precisely what *Nichols* forbids.<sup>59</sup> Thus, if *Nichols* is followed, the government is left with just two options: either grant access or defer the proceedings. In the event the government declines to disclose classified information to uncleared counsel, deferral of the charges almost always means dismissal of those charges.

The government's response to this disclose or defer requirement is to challenge the *Nichols* decision, seeking its reversal or limiting it to its facts. The case involved information that was ultimately declassified. Also, the civilian defense attorney, a former United States Army Counterintelligence Corps Officer, was clearly not a security risk.

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<sup>51</sup> AR 27-10, para. 16-4a(8).

<sup>52</sup> R.C.M. 109(a).

<sup>53</sup> Dep't of Army, Pamphlet No. 27-26, Rules of Professional Conduct for Lawyers (Dec. 1987) [hereinafter Army Rules of Professional Conduct]. The Army Rules of Professional Conduct replaced the American Bar Association Model Code of Professional Responsibility as the Army standard. See AR 27-10, para. 5-8.

<sup>54</sup> AR 27-10, para. 16-4a(11).

<sup>55</sup> "The regulation authorizes suspension for "attempting to act as counsel in a case involving a security matter by one who is a security risk." AR 27-10, para. 16-4a(8).

<sup>56</sup> R.C.M. 109(a).

<sup>57</sup> *Id.*; see also AR 27-10, ch. 16.

<sup>58</sup> *Nichols*, 23 C.M.R. at 349.

<sup>59</sup> *Id.*

In *Nichols*, reliance upon *United States v. Andolschek*<sup>60</sup> is misplaced. *Andolschek* does stand for the proposition that, where material directly touches the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess.<sup>61</sup> Nevertheless, the opinion only held that the trial judge erred where he excluded unclassified reports prepared by accused.<sup>62</sup> Exclusion rested solely on the basis that Treasury Department Regulations prohibited disclosure of agent reports.<sup>63</sup> No specific privilege was claimed other than the regulatory prohibition. Thus, *Andolschek* does not address the issue of the government's right to protect national security.

As noted in the concurring opinion in *Nichols*,<sup>64</sup> certainly the government should have the right to take reasonable steps to prevent disclosure of classified information to possibly disloyal persons.<sup>65</sup> The government should be prepared to demonstrate by a preponderance of the evidence<sup>66</sup> that the selected counsel presents a security risk. The Defense Investigative Service background investigation and agency checks should be presented. The government should urge the military judge to balance the security interests of the government against the accused's right to counsel.

Moreover, there will most often be a substantial number of lawyers who pose no security risk and will be granted access. The accused should have no difficulty in selecting another counsel who can be granted access. When balancing the right of the accused to defense counsel of his own choice versus the right of the government to protect classified information, limiting the accused's selection in this manner will not deny a substantial right.<sup>67</sup>

Additionally, the Military Rules of Evidence authorize the military judge, at the request of the government, to issue a protective order requiring security clearances "for persons having a need to examine the information in connection with preparation of the defense" prior to disclosure to the defense.<sup>68</sup> Thus, without reliance upon a "service imposed regulation" the government can seek a protective order preventing release of classified information to a defense counsel without a clearance.

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<sup>60</sup> 142 F.2d 503 (2d Cir. 1944).

<sup>61</sup> *Id.* at 506.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 505.

<sup>64</sup> *Nichols*, 23 C.M.R. at 350. The opinion notes that it is filed in opposition to the majority opinion. *Id.*

<sup>65</sup> *Id.* at 351.

<sup>66</sup> R.C.M. 905(c)(1).

<sup>67</sup> *Id.*

<sup>68</sup> Mil. R. Evid. 505(g)(1)(D).



Where the accused requests an individual military counsel who lacks the requisite clearance, the requested counsel's commander could determine that the counsel was not reasonably available.<sup>69</sup> In determining whether a particular counsel is available, the responsible authority may consider "all relevant factors, including, but not limited to . . . the nature and complexity of the charges and legal issues involved in the case."<sup>70</sup> Thus, where individual military counsel presents a security risk, the commander could simply decide that the requested counsel is unavailable. Again, this may run afoul of the holding in *Nichols*.

*Nichols'* disclose or defer requirement is simply unfair to the prosecution. Rather than disclose classified information to counsel who present a security risk, and for reasons unrelated to guilt or innocence, the government would in some instances choose not to prosecute. Moreover, accused facing charges involving classified information could intentionally select counsel to force the government to withdraw the charges. Therefore, *Nichols* should not be followed.

### ***C. LIMITATIONS UPON DEFENSE COUNSEL WHO ARE GRANTED A CLEARANCE AND ACCESS***

Once the government decides to take steps to grant counsel security clearances, the routine process of granting the clearance may take a substantial period of time.<sup>71</sup> Certain officials, however, are authorized to grant interim clearances pending the completion of personnel security investigations.<sup>72</sup> Additionally, waivers of certain requirements can be sought through staff security offices from the Office of the Assistant Chief of Staff for Intelligence, Headquarters, Department of Army.<sup>73</sup> Ordinarily, proceedings will have to be delayed while the Army processes the clearance.<sup>74</sup> To avoid inordinate delays and any attendant speedy trial problems,<sup>75</sup> the government may have to seek waivers or interim clearances.

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<sup>69</sup>R.C.M. 506(b)(2).

<sup>70</sup>AR 27-10, para. 5-7d.

<sup>71</sup>See generally AR 604-5.

<sup>72</sup>*Id.* para. 3-800 and app. F.

<sup>73</sup>*Id.* para. 1-500 (Requests for waivers should be addressed to HQDA(DAMI-CIS) Washington, D.C. 20310).

<sup>74</sup>See *United States v. Gribus*, 21 M.J. 1 (C.M.A. 1985) (proceedings delayed in order to clear civilian counsel).

<sup>75</sup>In general, the accused must be brought to trial within 120 days of notice of preferral of the charges or imposition of restraint whichever occurs earlier. R.C.M. 707(a). Delays for good cause are excluded from the 120-day requirement. R.C.M. 707(c)(8).

Upon granting defense counsel clearances and access, the prosecution must decide what reasonable limits it will seek to place upon the handling of classified material.<sup>76</sup> If discovery is sought prior to referral of charges, the government may disclose classified information subject to conditions that will minimize unauthorized disclosure.<sup>77</sup> After referral, the government must request that the military judge issue a protective order to regulate defense handling of the classified information.<sup>78</sup>

Whether conditions are imposed by the government prior to referral or incorporated in a protective order issued by the military judge<sup>79</sup>, the following safeguards may be ordered: (1) requiring storage of classified material in an appropriate safe,<sup>80</sup> (2) requiring controlled access at government facilities,<sup>81</sup> (3) requiring the defense to maintain logs recording who has had access to the classified information (as authorized by the military judge),<sup>82</sup> and (4) regulating handling of defense notes and working papers containing classified information.<sup>83</sup>

While these requirements are reasonable and part of the everyday workload for those who routinely handle classified information, they can present a significant burden for the defense. Counsel can no longer work in their office; it may become necessary to work with classified material at a designated security area.<sup>84</sup> Rather than reviewing material at their convenience, defense counsel could be required to check out classified material, including their working papers.<sup>85</sup> Documents

<sup>76</sup>The prosecution may also choose to claim that specific items of classified information are privileged from disclosure. *See infra* text accompanying notes 187–204.

<sup>77</sup>R.C.M. 505(d)(5).

<sup>78</sup>R.C.M. 505(g)(1).

<sup>79</sup>Federal courts have established procedures for handling classified material by court personnel as well as defense counsel. In addition, federal judges can issue protective orders further protecting classified information. *See* Security Procedures Issued Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information 18 U.S.C. app. § 9 note (1982) (References in Text) [hereinafter Chief Justice's Security Procedures].

<sup>80</sup>Mil. R. Evid. 505(g)(1)(B); *see also* AR 380-5, ch. 5. In some instances, information must be stored in certain types of storage containers in facilities with alarms and guards that can respond within ten minutes. *Id.* para. 5-102(a)(3).

<sup>81</sup>Mil. R. Evid. 505(g)(1)(C).

<sup>82</sup>Mil. R. Evid. 505(g)(1)(E). Generally, the maintenance of such logs is required when top secret or sensitive compartmented information is involved. AR 380-5, para. 7-300.

<sup>83</sup>Mil. R. Evid. 505(g)(1)(F); *see* AR 380-5, para. 7-304.

<sup>84</sup>In federal court, except as provided by protective orders, defense counsel are not provided custody of classified information. In the discretion of the court, the defense may be granted access to classified information in secure government facilities; however, control of the information remains with a court appointed security officer. Chief Justice's Security Procedures, *supra* note 79, para. 8a.

<sup>85</sup>Working papers prepared by defense counsel containing classified information must be handled in accordance with AR 380-5. *See* AR 380-5, para. 7-304. Arrangements must of course be made to ensure that attorney-client confidences and secrets are preserved and that defense work product remains privileged.

that contain classified material cannot be prepared on just any typewriter or wordprocessor. Word processors may have to be approved for the preparation of classified documents.<sup>86</sup> Typewriter ribbons that contain classified information must also be securely stored.<sup>87</sup>

These requirements may result in the government assigning security personnel to regulate the handling of classified information by the defense.<sup>88</sup> Also, the government may choose to provide the defense with separate work and classified storage areas.<sup>89</sup>

Servicemembers have challenged security requirements designed to guard against unauthorized disclosure of classified information. In *DeChamplain v. McLucas*,<sup>90</sup> an Air Force sergeant, whose previous conviction for espionage-related offenses had been set aside,<sup>91</sup> persuaded a district court that security limitations sustained by the military judge at the retrial abridged the accused's right to a fair trial.<sup>92</sup> At the retrial, the Air Force had granted military counsel, one civilian counsel, one legal associate of the civilian counsel, and one secretary access to some, but not all the classified information related to the case.<sup>93</sup> Classified information made available was to be examined in the presence of persons with appropriate security clearances. No photocopying of information was allowed. Written notes would be examined by Air Force security personnel and notes containing classified information were to remain in Air Force custody, and members of the defense could only discuss classified information with those granted access.<sup>94</sup>

The defense urged that these limitations were overly restrictive. Civilian defense counsel sought authorization to declassify documents himself. Furthermore, he sought permission to discuss the classified information related to the case with various experts.<sup>95</sup> Finding that the defense should be granted full and unlimited access to all documents relevant to the case, subject to an appropriate protective order,

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<sup>86</sup>AR 380-380, para. 1-20.

<sup>87</sup>AR 380-5, para. 5-201(b).

<sup>88</sup>The protective order issued by the military judge may request that the convening authority authorize assignment of security personnel. Mil. R. Evid. 505(g)(1)(G). In federal court, the judge designates a security officer. Chief Justice's Security Procedures, *supra* note 79, para. 2.

<sup>89</sup>*Id.*

<sup>90</sup>367 F.Supp. 1291 (D.D.C.1973), *red.*, 421 U.S. 21 (1975); *see also* United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986).

<sup>91</sup>United States v. DeChamplain, 46 C.M.R. 782 (A.F.C.M.R.1972), *aff'd.*, 46 C.M.R. 150 (C.M.A. 1973).

<sup>92</sup>*DeChamplain*, 367 F.Supp. at 1296.

<sup>93</sup>*Id.* at 1297-98.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

the district court granted a preliminary injunction. Unfortunately, the district court objected to the restrictions as a whole "as clearly excessive" without commenting on the merits of each limitation.<sup>96</sup> Without reaching the fairness of the restrictions imposed on the defense, and citing *Schlesinger v. Councilman*<sup>97</sup>, the Supreme Court reversed.<sup>98</sup> Finally, at his retrial, the accused pled guilty and the issue of restrictions, if they remained in force, was not addressed on appeal.<sup>99</sup>

Thus, *DeChamplain* is of little value in deciding whether security restrictions are fair to the defense. Moreover, *DeChamplain* was decided before the Military Rules of Evidence and the Classified Information Procedures Act addressed defense handling of classified information.

In one reported military case addressing security restrictions placed on counsel since the Military Rules of Evidence went into effect, the defense consented to an unusual procedure whereby a nonlawyer officer senior to the accused was assigned to the defense team to screen communication of classified information between the accused and his attorneys.

In *United States v. Baasel*,<sup>100</sup> an electronic warfare officer, assigned to a strategic reconnaissance unit and charged with filing false claims and writing bad checks, requested that the convening authority grant his civilian and military counsel access to information related to the officer's classified duties.<sup>101</sup> The convening authority denied that request, but offered to assign an officer authorized access to assist the defense team. It was understood that the officer would not be called as a witness and that all communications between the accused and the defense team remained privileged.<sup>102</sup>

When the accused wished to communicate potentially classified information to his defense attorneys, the accused would write out what he wished to communicate and hand it to the cleared officer. If the communication contained classified information, the cleared officer would so advise the accused that disclosure to the defense was not authorized. Then the government would have to take steps to claim that the communication was privileged under Military Rule of

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<sup>96</sup>*Id.* at 1295-96.

<sup>97</sup>420 U.S. 738, 758 (1975) (though courts-martial convictions may be subject to collateral attack, federal courts must refrain from intervening by way of injunction).

<sup>98</sup>*DeChamplain v. McLucas*, 421 U.S. 21 (1975).

<sup>99</sup>*United States v. DeChamplain*, 1 M.J. 803 (C.M.A. 1976).

<sup>100</sup>22 M.J. 505 (A.F.C.M.R. 1986).

<sup>101</sup>*Id.* at 507.

<sup>102</sup>*Id.*

Evidence 505. The defense accepted the convening authority's offer and the cleared officer screened communications from the accused to counsel; no information was ever screened out, however.<sup>103</sup>

Because no communications between counsel and accused were blocked, the classified information procedures under Military Rule of Evidence 505 were never invoked.

Nevertheless, the defense objected that this procedure infringed upon accused's right to assistance of counsel. While noting that the screening requirement was burdensome, the Air Force Court of Military Review held that "in the absence of any significant impediment which prevented full and effective communications during the defense process, we find that the appellant was not deprived of his constitutional rights under the Sixth Amendment to have the assistance of counsel for the defense."<sup>104</sup>

In cases related to classified information, the defense should endeavor to limit *Baasel*. First, an objection should be made to the assignment of any lay-officer as part of the defense team. Second, the defense should distinguish *Baasel*, pointing out that classified information was not central to any of the charges in *Baasel*, nor did classified information relate to any defense. In *Baasel*, the defense simply urged that the accused officer was a pathological gambler without demonstrating a particularized need for classified information concerning the accused's duties. While good military character can always be part of one's defense either on the merits or in extenuation and mitigation, it's unlikely that specific classified information need be revealed. In *Baasel*, apparently the accused couldn't even think of any classified information relevant to his defense.

Of course, the prosecution should argue that, until distinguished, *Baasel* is applicable to cases involving classified information, at least where classified information is tangentially related to the case. And the screening of communication can be required whenever counsel have not been granted security clearances and access equal to or greater than those of the accused.

In any event, certainly the established security requirements generally applicable to the handling, storing, and accounting of classified documents,<sup>105</sup> are reasonable limitations that should be imposed on counsel.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* notes 80-89 See generally AR 380-5

### III. THE RIGHT TO DISCOVERY AND THE CLASSIFIED INFORMATION PRIVILEGE UNDER MILITARY RULE OF EVIDENCE 505

Assuming that the granting of clearances and access to the defense is resolved, the next issues that arise in a case involving classified information are, first, to what extent must the government provide discovery of classified information and, second, to what extent may the defense disclose or cause the disclosure of classified information. The right to discover evidence helpful to the defense<sup>106</sup> and to present that evidence are essential ingredients of a fair trial. The sixth amendment of our Constitution guarantees the accused the right of compulsory process to present evidence.<sup>107</sup> On the other hand, evidentiary rules have always included certain privileges.<sup>108</sup> This section examines the accused's interest in discovering and using classified information and the government's interest in preventing such disclosure and use.

#### A. HISTORICAL, BACKGROUND

Since the early nineteenth century federal courts have recognized government claims of executive privilege to prevent the disclosure of official information.<sup>109</sup> But, it was not until well after the Civil War that the Supreme Court recognized a military or state secret privilege in a case where the government was forced by the court to withhold information that the government was prepared to disclose. In *United States v. Totten*,<sup>110</sup> the Supreme Court held that "public policy" prohibited maintaining suits in which confidential military information would necessarily be disclosed.<sup>111</sup>

Although in the next seventy-five years federal courts occasionally addressed, in civil suits, the issue of government privilege to protect against the disclosure of classified information,<sup>112</sup> it was not until

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<sup>106</sup>See *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>107</sup>The sixth amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

<sup>108</sup>*Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280 (1826) (lawyer-client privilege).

<sup>109</sup>*United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692) (accused sought letter affecting United States foreign relations with Spain).

<sup>110</sup>*Totten v. United States*, 92 U.S. 105 (1875) (administrator of deceased Union secret agent who operated behind Confederate lines sought back payment of monthly salary).

<sup>111</sup>*Id.* at 107.

<sup>112</sup>*Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912).

World War II that a federal court examined the issue in a criminal case.<sup>113</sup>

In *United States v. Haughen*,<sup>114</sup> a district court observed that the right of the Army to refuse to disclose confidential information was indisputable. Relying on Department of Army Regulation 380-5 and a War Department refusal to disclose the contents of a secret contract concerning the serving of meals at a then highly secret plutonium manufacturing plant,<sup>115</sup> the court barred the defense from examining the contract, even though it was clearly relevant and material to the accused's defense.

The defendant had been charged with counterfeiting meal tickets to defraud the United States. Whether the organization defrauded was an agency of the United States was an element of the offense. This issue could best be resolved by an examination of the contract; the defense was never permitted to review the contract, however. A War Department attorney testified concerning unclassified portions of the contract.

This is the only reported case where relevant and material information, necessary to the defense of a criminally accused, has been held privileged. This case can best be explained as a wartime aberration that relied in part on the war power of the executive branch.<sup>116</sup>

In *United States v. Reynolds*,<sup>117</sup> the Supreme Court first outlined the procedure by which the government may assert claims of military or state secret privilege. The court noted that the privilege against revealing military secrets was well established. The court decided, however, that the privilege could only be invoked after personal consideration by the officer heading the department that controls the secret material.<sup>118</sup>

In connection with their wrongful death actions, the plaintiffs in *Reynolds* sought discovery of information concerning the crash of a B-29 bomber while testing secret electronic equipment. The Court

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<sup>113</sup>*United States v. Haughen*, 58 F.Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850 (9th Cir. 1946).

<sup>114</sup>*Id.*

<sup>115</sup>See Zagel, *The State Secret Privilege*, 50 Minn. L. Rev. 875, 904 (1966).

<sup>116</sup>In *Haughen*, the district court relied in part on the Supreme Court decision in *United States v. Kiyoshi Hirabayashi*, 320 U.S. 81 (1943) (Japanese curfew cases). In *Kiyoshi*, the Supreme Court declined to define the "ultimate boundary" of the war power and held that "it [was] enough . . . [that there was] a rational basis for the decision . . . made." *Id.* at 102. In *Haughen*, there was no balancing of the right of the accused against that of the government. Instead, the court accepted the government's rational basis for claiming privilege. *Id.*

<sup>117</sup>345 U.S. 1 (1953).

<sup>118</sup>*Id.* at 19-20.

noted that, in a civil case, plaintiffs have no right to classified information.<sup>119</sup> The Court distinguished plaintiffs' civil case from the criminal cases<sup>120</sup> in which the Second Circuit barred claims of government privilege in criminal prosecutions unrelated to classified information.<sup>121</sup>

Since *Reynolds*, the Supreme Court has examined executive privilege,<sup>122</sup> but not with respect to state or military secrets.<sup>123</sup> Thus, the issue of privilege with respect to classified information in a criminal case has yet to be addressed by the Supreme Court.<sup>124</sup>

Prior to the Military Rules of Evidence, the invoking of privilege to protect classified information was unknown to military practice. Moreover, the Court of Military Appeals decision in *Nichols*<sup>125</sup> and decisions of the service boards of review expressly rejected government efforts to prevent the disclosure of classified information at courts-martial.<sup>126</sup>

In *United States v. Dobr*,<sup>127</sup> where the government prevented disclosure of classified information at trial by ordering defense counsel not to disclose the existence of such information to the military judge, the Army Board of Review set aside the conviction, and held that the defense "must be free to introduce *any* evidence otherwise admissible that he deems necessary for the defense of his client unfettered by command coercion."<sup>128</sup> The board wrote: "We further desire to point out that in a prosecution where testimony or documents involve classified information and are relevant to any issue, either for the government or defense, the Government must make an election either to permit the introduction of said classified evidence or to abandon the prosecution."<sup>129</sup> Thus, the board made no allowance for government claims of privilege to guard against the disclosure of classified information.

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<sup>119</sup>*Id.* at 12.

"United States v. Beckman, 155 F.2d 580 (2d Cir. 1946) (No privilege where disclosure of witness' disciplinary record barred by Office of Price Administration regulation); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944) (No privilege where disclosure of unclassified employee reports barred only by Treasury Regulation).

"*Reynolds*, 345 U.S. at 12.

"United States v. Nixon, 418 U.S. 687 (1974).

<sup>123</sup>In *Nixon*, the Court noted, "we are not here concerned with . . . the President's interest in preserving state secrets." *Id.* at 712 n.19.

<sup>124</sup>A diligent search failed to reveal any petition for certiorari to the Supreme Court challenging the Classified Information Procedures Act.

<sup>125</sup>8 C.M.A. 119, 23 C.M.R. 343 (1957).

"United States v. Dobr, 21 C.M.R. 451 (A.B.R. 1956); United States v. Reyes, 30 C.M.R. 776 (A.F.B.R. 1960).

<sup>127</sup>21 C.M.R. 451 (A.B.R. 1956).

<sup>128</sup>*Id.* at 455.

<sup>129</sup>*Id.*



Similarly, where the president of a court-martial stopped a witness from disclosing classified information at trial, the Air Force Board of Review reversed, holding that "the fact of classification does not have any bearing on whether the evidence should ultimately be admitted."<sup>130</sup> Without addressing the issue of the government invoking privilege or closing the court, the board presumed that the government had the choice of introducing the information or withdrawing the prosecution.<sup>131</sup>

As already discussed, chiefly citing *United States v. Andolshcek*,<sup>132</sup> the *Nichols* decision rejected government refusals to disclose classified information to the defense.

Likewise, before Military Rule of Evidence 505, no Manual for Courts-Martial addressed whether a military secrets privilege existed. The former rules of evidence applicable to courts-martial<sup>133</sup> noted that it might be necessary sometimes to introduce "confidential or secret" evidence.<sup>134</sup> While recognizing that investigations of the Inspectors General were privileged, for classified information the rules provided only guidance on clearing the court of spectators.<sup>135</sup>

Thus, while civilian law has long recognized the exercise of executive privilege to protect military or state secrets, the claiming of that privilege to prevent disclosure of classified information was unheard of prior to the Military Rules of Evidence.

## ***B. MILITARY RULE OF EVIDENCE 505, "CLASSIFIED INFORMATION"***

Military Rule of Evidence 505 became effective on September 1, 1980, along with the rest of the then-new Military Rules of Evidence.<sup>136</sup> While many of the rules are identical to or very similar to

<sup>130</sup>*Reyes*, 30 C.M.R. at 786.

<sup>131</sup>*Id.* at 787 n.3.

<sup>132</sup> 142 F.2d 503 (2d Cir. 1944).

<sup>133</sup>*Manual for Courts-Martial*, United States, 1969 (Rev. ed.), ch. 27 [hereinafter MCM, 1969].

<sup>134</sup>*Id.* para. 151b(3).

<sup>135</sup>The provision reads, in part, as follows:

In a case of this type [involving classified information], adequate precautions should be taken to ensure that no greater dissemination of the confidential or secret evidence occurs than the necessities of the trial require. The courtroom should be cleared of spectators while evidence of this nature is being received or commented upon, and all persons whose duties require them to remain should be warned that they are not to disclose the confidential or secret information.

*Id.*

<sup>136</sup>Exec. Order No. 12,198, 3 C.F.R. 151 (1980).

corresponding rules in the Federal Rules of Evidence, the military rules regarding evidentiary privileges greatly expanded upon the single Federal Rule addressing privileges.<sup>137</sup>

### *1. Legislative History.*

Military Rule 505 was based on legislative efforts to regulate the disclosure of classified information in federal courts.<sup>138</sup> As early as 1977, the Senate began studying the issue of the disclosure of classified information in connection with criminal prosecutions.<sup>139</sup> Senate staffers interviewed dozens of officials from the Department of Justice, the Department of State, the National Security Agency, the Central Intelligence Agency, and the Defense Intelligence Agency.<sup>140</sup> The Senate Select Committee on Intelligence issued a report in 1978 voicing concerns about the difficulty of enforcing the laws protecting national security.<sup>141</sup>

Of particular concern was the problem of “graymail”—defense threats, frequently legitimate, to disclose classified information during the course of the trial.<sup>142</sup> The report noted: “The more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard national security . . . [because] . . . the government

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<sup>137</sup>Fed. R. Evid. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

The rules originally proposed by the Supreme Court contained thirteen rules defining nine nonconstitutional privileges, including a state secret and other official information privilege. The proposed privilege rules were controversial. So to ensure passage, Congress passed a bill substituting the current Rule 501 for the proposed individual rules. See S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 200-202 (2d ed. 1977).

<sup>138</sup>*Manual for Courts-Martial, United States*, 1984, Military Rule of Evidence 505 analysis [hereinafter Mil. R. Evid. 505 analysis].

<sup>139</sup>S. Rep. No. 823, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4294 [hereinafter S. Rep. No. 823].

<sup>140</sup>*Id.* at 1-2 (citing Report of the Select Committee on Intelligence 1978, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess.).

<sup>141</sup>*Id.* at 2 (citing Report of the Select Committee on Intelligence 1978, National Security Secrets and the Administration of Justice, 95th Cong., 2d Sess.).

<sup>142</sup>*Id.* at 2. Where military counsel are involved graymail has never been a problem. In addition to any orders issued by the military judge, military counsel are bound by the provisions of AR 380-5, AR 380-5, para. 1-201. Under certain circumstances, causing the disclosure of classified information to persons without clearances and access is a dereliction of duty in violation of UCMJ article 92. AR 380-5, para. 1-201.

must often choose between disclosing classified information in the prosecution or letting the conduct go **unpunished**.<sup>143</sup> The report concluded: "Congress should consider the enactment of a special omnibus pre-trial procedure to be used in cases when national security secrets are likely to arise in the course of criminal prosecution."<sup>144</sup>

In response, the House and Senate each held hearings<sup>145</sup>, and three bills concerning classified information procedures were introduced in Congress.<sup>146</sup> Military Rule of Evidence 505 was based on the administration sponsored bill.<sup>147</sup> Dropping the administration bill, the House Committee on Intelligence favorably reported its bill.<sup>148</sup> Before the committee issued its report, the President signed an executive order promulgating the Military Rules of Evidence, including Rule 505.<sup>149</sup>

Eventually, House and Senate conferees adopted the Senate bill with minor modifications.<sup>150</sup> The modified Senate bill was enacted into law as the Classified Information Procedures Act.<sup>151</sup> The provisions of Rule 505 and the Classified Information Procedures Act appear, for the most part, to be patterned after one another and are in some instances textually identical.<sup>152</sup>

## 2. *Disclosure of Classified Information to the Defense.*

Both Rule 505 and the Classified Information Procedures Act authorize disclosure of classified information to the defense.<sup>153</sup> Under both procedures, disclosure to the defense can be made subject to a protective order issued by the court.<sup>154</sup> Upon motion, the court may authorize<sup>155</sup> the government to admit facts in lieu of providing specific classified information.<sup>156</sup> Alternatively, the government may delete or substitute specific items of classified information in documents.<sup>157</sup>

<sup>143</sup>S. Rep. No. 823, *supra* note 139, at 3.

<sup>144</sup>*Id.*

<sup>145</sup>*See id.* at 3; H. Rep. No. 831, 96th Cong., 2d Sess., pt. 1 at 10 (1980) [hereinafter H. Rep. No. 831].

<sup>146</sup>S. 1482, 96th Cong., 2d Sess. (1979); H.R. 4736, 96th Cong., 2d Sess. (1979); and H.R. 4745, 96th Cong., 2d Sess. (1979). All three bills were introduced on July 11, 1979.

<sup>147</sup>H.R. 4745, *supra* note 146; *see* Mil. R. Evid. 505 analysis.

<sup>148</sup>H. Rep. No. 831, *supra* note 145.

<sup>149</sup>Exec. Order No. 12,198, 3. C.F.R. 151 (signed Mar. 12, 1980).

<sup>150</sup>H.R. Conf. Rep. No. 1436, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4307.

<sup>151</sup>18 U.S.C. app. §§ 1-16 (1982) (CIPA).

<sup>152</sup>*Compare* 18 U.S.C. app. § 2 (1982) (CIPA) *with* Mil. R. Evid. 505(b) (definitions of classified information and national security nearly identical).

<sup>153</sup>*Compare* 18 U.S.C. app. § 4 (1982) (CIPA) *with* Mil. R. Evid. 505(g).

<sup>154</sup>*Compare* 18 U.S.C. app. § 3 (1982) (CIPA) *with* Mil. R. Evid. 505(g)(1).

<sup>155</sup>In military cases, before referral, the convening authority may authorize admissions on his own. Mil. R. Evid. 505(d).

<sup>156</sup>*Compare* 18 U.S.C. app. § 4 (1982) (CIPA) *with* Mil. R. Evid. 505(g)(2).

<sup>157</sup>*Compare* 18 U.S.C. app. § 4 (1982) (CIPA) *with* Mil. R. Evid. 505(g)(2).

Government motions to delete, to substitute, or to admit facts in lieu of full disclosure and materials submitted in support of the motion may be reviewed by the judge alone without disclosure to the defense. Both the Federal and Military procedures authorize use of ex parte proceedings.<sup>158</sup> Of course, if deleted or substituted, classified information is necessary to the defense, the judge may deny the motion.

### *3. Notice Requirements Concerning Defense Disclosure of Classified Information.*

Both Rule 505 and the Classified Information Procedures Act require the accused to provide notice of any intention to disclose or cause the disclosure of classified information.<sup>159</sup> The notice provisions, coupled with the in camera hearing procedures, are the real heart of the procedures designed to guard the government's interest in protecting classified information.

At courts-martial and in federal court, the accused is required to provide the government with advance notice of intentions "to disclose or to cause the disclosure of classified information in any manner."<sup>160</sup> The notice must include a brief description of the classified information.<sup>161</sup> A general statement of the classified areas the defense will cover is insufficient.<sup>162</sup> The government must have sufficient notice so that it can make an informed decision either acquiescing to the disclosure, claiming privilege, or abandoning the prosecution. As noted by the Eleventh Circuit, permitting vague, nonspecific notices of intent to disclose classified information is tantamount to graymail and must not be permitted.<sup>163</sup>

Ignoring the plain language and legislative history of the notice requirement, one writer has concluded that "the government is not entitled to disclosure of intended [defense] cross-examination under the rubric of Rule 505(h)."<sup>164</sup> He suggests that the well-prepared prosecutor should be charged with knowing everything his own witnesses know relevant to their direct examination. The writer further concludes that it serves no just purpose to tell the government what its own witnesses know.<sup>165</sup>

<sup>158</sup> See *infra* text accompanying notes 205–45 for a discussion of ex parte proceedings.

<sup>159</sup> Compare 18 U.S.C. app. § 5 (1982)(CIPA) with Mil. R. Evid. 505(h).

<sup>160</sup> Compare 18 U.S.C. app. I 5 (1982) (CIPA) with Mil. R. Evid. 505(h)(1).

<sup>161</sup> Compare 18 U.S.C. app. I 5 (1982) (CIPA) with Mil. R. Evid. 505(h)(3).

<sup>162</sup> United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983).

<sup>163</sup> *Id.* at 1200.

<sup>164</sup> Woodruff, *Practical Aspects of Trying Cases Involving Classified Information*, The Army Lawyer, June 1986, at 53.

<sup>165</sup> *Id.*

These conclusions should be rejected for four reasons. First, notice is required if the defense “reasonably expects to disclose or to cause the disclosure of classified information *in any manner* in connection with a trial or pretrial [court-martial] proceeding.”<sup>166</sup> The plain meaning of this broad language includes disclosures of classified information caused by defense cross-examination. Had the drafters of either the military rule or the Classified Information Procedures Act intended to except defense cross-examination from the notice, they would not have used the phrase “in any manner in connection”.

Second, the purpose of the notice requirement is to afford the government the opportunity, prior to trial, to object to the defense disclosing specific classified information.<sup>167</sup> Moreover, the drafter’s analysis to the rule provides that the purpose of the notice section is to give the government an “opportunity to determine what position to take concerning the possible disclosure of that information.”<sup>168</sup> Creating an exception for cross-examination again permits the defense to “graymail” the government.

Third, the legislative history of the virtually identical notice requirement of the Classified Information Procedures Act clearly establishes that the drafters of the language intended to include defense cross-examination.<sup>169</sup> The Senate Committee Report provided: “The [notice] subsection is intended to cover not only information that the defendant plans to introduce into evidence . . . but also information which will be elicited from witnesses and all information which may be made public through defendant’s effort.”<sup>170</sup> Clearly, it was contemplated that notice would apply to defense cross-examination as well as direct.

Fourth, it is unreasonable to charge even a well-prepared prosecutor with knowing everything government witnesses may know relevant to their testimony on direct. Gone are the days when the prosecution vouched for the credibility of its witnesses.<sup>171</sup> Especially in cases related to compartmented classified information, it is possible that the accused may have had access to classified information known to a witness affecting the credibility of that witness, but not known to the prosecution. Thus, it is ludicrous to charge the prosecution with constructive knowledge of the answers to all defense cross-

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<sup>166</sup> 18 U.S.C. app. § 5(a) (1982) (CIPA); Mil. R. Evid. 505(h)(1) (emphasis added).

<sup>167</sup> “Notice must be provided prior to arraignment unless the military judge specifies a different date. R.C.M. 505(h)(1).”

<sup>168</sup> “R.C.M. 505(h) analysis.”

<sup>169</sup> S. Rep. No. 823, *supra* note 139.

<sup>170</sup> *Id.* at 7.

<sup>171</sup> “The prosecution may attack the credibility of its own witnesses. Mil. R. Evid. 607.

examination questions. Clearly, the notice requirement of Rule 505 should apply during every session and to all testimony.

Both Rule 505 and the Classified Information Procedures Act impose upon the defense a continuing duty to provide notice of any intention to disclose classified information.<sup>172</sup> The sanction for failing to comply with the notice requirement is harsh. The court may preclude the defense from disclosing the classified information, or may prohibit defense examination of any witness with respect to the classified information for which notice was not **provided**.<sup>173</sup>

#### 4. *Reciprocal Notice.*

The notice requirements of the two rules differ in one key respect. The Classified Information Procedures Act provides that when the court authorizes the defendant to disclose classified information, for which notice must have been provided, the court shall direct the government to provide the accused with any information it expects to use to rebut the classified information.<sup>174</sup> Military Rule of Evidence 505 contains no such reciprocal obligation.<sup>175</sup>

Congress included this reciprocity because of concerns that due process required it.<sup>176</sup> Generally, where criminal procedures require the defense to disclose evidence it intends to offer at trial, the government is required to disclose the evidence it will offer in **rebuttal**.<sup>177</sup> Because no reciprocal notice is required under Rule 505, a strong argument can be made for the proposition the notice requirement imposed on the defense is constitutionally defective.

In *Wardius v. Oregon*,<sup>178</sup> the Supreme Court examined a state notice of alibi requirement and decided that “[d]ue process of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal **defendants**.”<sup>179</sup> Having held in a previous case that notice of alibi rules with reciprocal discovery did not deprive an accused of due process or a fair trial,<sup>180</sup> the Court in *Wurdus* said: “It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting

<sup>172</sup> 18 U.S.C. app. § 4 (1982) (CIPA); Mil. R. Evid. 505(h)(2).

<sup>173</sup> 18 U.S.C. app. § 5(b) (1982) (CIPA); Mil. R. Evid. 505(h)(5).

<sup>174</sup> 18 U.S.C. app. § 6(f) (1982) (CIPA).

<sup>175</sup> Mil. R. Evid. 505(h).

<sup>176</sup> H. Rep. No. 831, *supra* note 145, pt. 1, at 23.

<sup>177</sup> R.C.M. 701(a)(3)(B); Fed. R. Crim. P. 12.1(b) (reciprocal discovery required when defense provides notice of defense of alibi or lack of mental responsibility).

<sup>178</sup> 412 U.S. 470 (1973).

<sup>179</sup> *Id.* at 472.

<sup>180</sup> *Williams v. Florida*, 399 U.S. 78, 81 (1970).

him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state."<sup>181</sup>

Though the notice requirements of Rule 505 have never been challenged, the parallel notice requirements of the Classified Information Procedures Act have.<sup>182</sup> Requiring the defense to provide notice of intent to disclose classified information has been sustained because the act imposes a reciprocal notice requirement on the government.<sup>183</sup>

Certainly, Rule 505 must be amended to provide for reciprocal notice concerning classified information the defense intends to disclose similar to the requirement imposed on the government by the Classified Information Procedures Act.<sup>184</sup> Adapted from the Federal procedure, a proposed provision to add to Rule 505 appears at appendix A to this article.

In *Wardius*, the Supreme Court also held that, with a strong showing of government interest to the contrary, reciprocity might not be required.<sup>185</sup> Similarly, under the Classified Information Procedures Act, the court need not order reciprocity unless fairness requires it.<sup>186</sup> Thus, while there may exist an isolated case where the military judge need not order reciprocal disclosure of government rebuttal, the better practice is to direct such reciprocity.

Until Rule 505 is amended, the defense will be able to successfully challenge the notice requirement of the rule. Absent compelling reasons, the military judge should require the government to provide reciprocal notice of rebuttal evidence. Doing otherwise invites error and is simply unfair.

### 5. *Claiming the Privilege.*

Whenever the government claims that classified information is privileged from disclosure the issue of fairness arises.

There are two circumstances in which the government may claim that classified information is privileged from disclosure. First, the government may claim privilege to prevent the accused from disclosing information about which the accused already knows. Once the accused provides notice of his intent to use or disclose the information at trial, the government decides whether to claim privilege, to declassify the information, or otherwise allow release.

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<sup>181</sup> *Wardius*, 412 U.S. at 476.

<sup>182</sup> *United States v. Wilson*, 570 F.2d 142 (2d Cir. 1984); *United States v. Collins*, 720 F.2d 1195 (11th Cir. 1983); *United States v. Jolliff*, 548 F.Supp. 229 (D. Md. 1981).

<sup>183</sup> *Collins*, 720 F.2d at 1200.

<sup>184</sup> 18 U.S.C. app. § 6(f) (1982) (CIPA).

<sup>185</sup> *Wardius*, 412 U.S. at 475.

<sup>186</sup> 18 U.S.C. app. § 6(f) (1982) (CIPA).

Second, the government may claim privilege to prevent the defense from discovering information that the government normally would provide, if the information were unclassified. Though these two sets of circumstances present different concerns that will be discussed separately, the procedure for claiming the privilege is the same.

Rule 505 requires that the “head of the executive or military department or government agency concerned” claim the privilege or authorize the trial counsel or a witness to make the claim.<sup>187</sup> While not having addressed the issue of delegation, the Supreme Court has held that the head of the department or agency having control over the matter must claim privilege only after “actual personal consideration by that officer.”<sup>188</sup> Thus, trial counsel must seek a personal determination from the Secretary of the Army for classified information controlled by the Army.

For courts-martial involving top secret or sensitive compartmented information, trial counsel stationed overseas may encounter significant difficulties because of restrictions placed on the transportation or transmission of classified information.<sup>189</sup> Even in the United States, preparation and communication of highly classified, compartmented information may require the detailing of special couriers to deliver the information to Department of Army Headquarters.<sup>190</sup>

Under the rule, the department head must decide the following: that the information is properly classified, and that disclosure of the information would be “detrimental to national security.”<sup>191</sup> Information is properly classified when the United States Government has determined “pursuant to an executive order, statute, or regulation . . . [that the information] require[s] protection against unauthorized disclosure for reasons of national security. . . .”<sup>192</sup> The executive order concerning national security information defines classified information as information or material “unauthorized disclosure of which reasonably could be expected to cause damage to national security.”<sup>193</sup>

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<sup>187</sup> Mil. R. Evid. 505(c).

“United States v. Reynolds, 345 U.S. 1, 20 (1953).

<sup>189</sup> See AR 380-5, ch. VIII.

<sup>190</sup> *Id.* para. 8-101(e).

<sup>191</sup> Mil. R. Evid. 505(c).

<sup>192</sup> Mil. R. Evid. 505(b)(1). Rule 505 also covers restricted data, as defined in 42 U.S.C. § 2014(y) (1982) (data related to atomic energy).

<sup>193</sup> Exec. Order No. 12,356, § 1.1(a)(3), 3 C.F.R. 166, 167, (1982), *reprinted in* 50 U.S.C. § 401 app. at 51 (1982). The order provides for three types of classified information: confidential, secret, and top secret. Unauthorized disclosure of information classified secret should reasonably be expected to cause serious damage to national security. *Id.* § 1.1(a)(2). Disclosure of top secret information should cause exceptionally grave damage to national security. *Id.* § 1.1(a)(1). Department of Defense Directive No. 5200.1, Department of Defense Information Security Program (June 7, 1982), implements the executive order. The classification definitions are repeated with examples in service regulations. AR 380-5, paras. 1-501 to 1-503.



Thus, if material is properly classified, then its unauthorized disclosure is by definition detrimental to national security and the two findings of the Department head are redundant.

Aside from the broad language in the executive order, there is no specific guidance on what information should be classified. The order also lists broad classification categories, including information concerning "military plans, weapons, or operations; . . . foreign government information; . . . intelligence activities (including special activities), or intelligence sources or methods; . . . foreign relations or foreign activities of the United States; or other categories of information . . . as determined by the President or [certain executive officials]."<sup>194</sup> But, again information pertaining to these categories should be classified only when it is determined that unauthorized disclosure, "either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."<sup>195</sup> While the executive order nowhere defines national security, Rule 505 and the Classified Information Procedures Act define national security as "national defense and foreign relations of the United States."<sup>196</sup>

With this sort of vague guidance, it is almost impossible for an accused to successfully challenge an agency head's assertion that disclosure of certain information would be detrimental to national security. As a practical matter, finding a knowledgeable expert to testify is virtually impossible.

Almost all classification experts are employed by the government, either directly or through defense contractors. Finding a witness who disagrees with the view of his department is hard enough in and of itself, but considering that a classification expert's livelihoods depend on keeping programs classified, there is a general tendency to over-classify (unless the security requirements incident to the classification are so onerous that there is pressure to downgrade the classification). In a way, security requirements, including classification of information, are like safety requirements. Security, like safety, is of critical importance and yet at some point security costs (as well as safety costs) exceed the cost of compromise (as well as injury). Finding a senior intelligence expert competent to evaluate classification determinations is simply not feasible.

About the only way to challenge the classification of information is to urge that it has already been disclosed or is generally known.

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<sup>194</sup> Exec. Order No. 12,356, § 1.3(a), 3 C.F.R. 166, 168-69 (1982)

<sup>195</sup> *Id.* § 1.3(b), 3 C.F.R. at 169.

<sup>196</sup> Mil. R. Evid. 505(c); 18 U.S.C. app. § 1 (1982) (CIPA).

Appearance of classified information in newspapers or any unofficial publication as well as inadvertent, unauthorized disclosure doesn't automatically result in declassification, **however**.<sup>197</sup> Moreover, unauthorized disclosure of intelligence sources or methods, identities of foreign confidential sources, and foreign government information are all presumed to cause damage to the national security.<sup>198</sup> Again, executive materials addressing classified information provide little opportunity to challenge an agency head's privilege determination.

As can be expected, the courts have been extraordinarily deferential in reviewing executive agency decisions related to national security. Claims of privilege for military secrets are entitled to the "utmost deference."<sup>199</sup> In examining a claim of privilege, the court should only be satisfied that "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged."<sup>200</sup> As one circuit has noted: "The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classification in that area."<sup>201</sup>

While only a few criminal cases have involved challenges to government claims that classified information is privileged, under the Freedom of Information Act<sup>202</sup> the government routinely claims that classified information is exempt from disclosure. Again, courts are very deferential to agency classification decisions.<sup>203</sup> Because the significance of individual items of classified information may appear trivial except when combined with other information, courts have routinely sustained the withholding of superficially "innocuous information."<sup>204</sup>

Thus, three factors—the unavailability of experts to challenge security determinations, the vague classification guidance, and the deference of judicial review—leave the defense with no fair opportunity to successfully challenge Army claims that classified information is privileged.

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<sup>197</sup> Exec. Order No. 12,356, *supra* note 193, § 1.3(d), 3 C.F.R. at 169.

<sup>198</sup> *Id.* § 1.3(c).

<sup>199</sup> United States v. Nixon, 418 U.S. 687, 710 (1974).

<sup>200</sup> United States v. Reynolds, 345 U.S. 1, 73 (1953).

<sup>201</sup> United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

<sup>202</sup> 5 U.S.C. § 552 (1982).

<sup>203</sup> Weissman v. CIA, 565 F.2d 602 (D.C. Cir. 1977).

<sup>204</sup> CIA v. Sims, 471 U.S. 159, 178 (1985) (names of universities engaged in brainwashing research for the CIA exempt from disclosure under FOIA); Halkin v. Helms, 598 F.2d. 1 (D.C. Cir. 1978) (Date and contents of accused's communications intercepted by the National Security Agency are privileged).

### 6. *Ex Parte, In Camera Review of Materials.*

Once the government claims privilege with respect to specific items of classified information that have not been disclosed to the defense, both Military Rule of Evidence 505 and the Classified Information Procedures Act permit the prosecution to submit motions limiting disclosure to the defense. These motions and supporting material may be submitted to the court without disclosing the motions or materials to the defense.<sup>205</sup>

The government makes these motions when required to provide exculpatory material, to comply with the requirements of the Jencks Act, or in connection with defense discovery requests. For example, suppose the defense-requested copies of all travel vouchers submitted by certain government witnesses who worked with the accused during a certain period. If inflated, the vouchers might be used on the merits to impeach the government witness or in extenuation and mitigation to show that padding vouchers by intelligence operators was widespread and perhaps condoned. Claiming privilege, the government moves to prevent disclosure of the vouchers, urging that the vouchers reveal overseas operating locations of highly sensitive operations. Redaction or excision of specific entries that would tend to show where the witnesses were, including dates, locations, airfares, and hotel rates, would render the vouchers useless to the defense. The government submits the vouchers to the military judge with a detailed explanation of how the vouchers show where the witnesses operated overseas and why these locations shouldn't be disclosed to the defense.

The military judge reviews these materials alone and decides whether "the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."<sup>206</sup> If the judge decides that disclosure is not warranted, the records of the proceeding and ex parte materials are sealed and included with the record trial for appellate review.<sup>207</sup> Where the military judge decides that disclosure is warranted, the government may offer a statement admitting facts, portions of the material, or summaries in lieu of disclosure.<sup>208</sup> The judge reevaluates the original classified information to determine if disclosure is still required in light of the government-offered alternatives.<sup>209</sup> Once the military judge determines that disclosure is still warranted and the government objects to the disclosure, the judge must issue "any order that

<sup>205</sup> Mil. R. Evid. 505(g)(2), (i)(4)(A); 18 U.S.C. app. §§ 4, 6(b)(1), 6(c)(2) (1982)(CIPA).

<sup>206</sup> Mil. R. Evid. 505(1)(4)(B).

<sup>207</sup> Mil. R. Evid. 505(i)(4)(C).

<sup>208</sup> Mil. R. Evid. 505(I)(4)(D).

<sup>209</sup> *Id.*

the interests of justice require."''' Alternatives include: declaring a mistrial;<sup>211</sup> dismissing some or all of the charges, with or without prejudice;<sup>212</sup> finding against the government on an issue related to the nondisclosed evidence;<sup>213</sup> or precluding a witness from testifying.<sup>214</sup> Yet, if, in response to the order, the government provides disclosure and permits disclosure at trial, then the government avoids the sanctions.<sup>215</sup>

Unlike the Classified Information Procedures Act, Rule 505 contains no provision for interlocutory appeals of these orders.<sup>216</sup> At courts-martial where punitive discharges may be adjudged, however, the government may appeal orders dismissing charges or excluding material testimony.<sup>217</sup>

Where classified information has been disclosed to the defense and the defense provides notice of intent to disclose that information at trial, this same procedure can be invoked by the government to prevent disclosure at trial. Because the defense already has access to the information, there is no need for an *ex parte* review of the materials by the military judge. In litigating the privilege issue, the government may move to close the proceedings to the public.

In those instances where the classified information in issue has already been disclosed to the defense, the party who loses on the issue of disclosure at trial, may still prevail by urging that the classified information be disclosed on the merits at a closed session. Unlike the Classified Information Procedures Act, Military Rule of Evidence 505 expressly provides for the exclusion of the public from courts-martial during portions of testimony disclosing classified information.<sup>218</sup>

Where the government is dissatisfied with the military judge's ruling rejecting alternatives to full disclosure, the trial counsel could move to have full disclosure of classified information at sessions closed to the public. Similarly, when the defense is dissatisfied with rulings

'''Mil. R. Evid. 505(i)(4)(E).

<sup>211</sup>Mil. R. Evid. 505(i)(4)(E)(ii).

'''Mil. R. Evid. 505(i)(4)(E)(iv) and (v).

<sup>213</sup>Mil. R. Evid. 505(i)(4)(E)(iii).

<sup>214</sup>Mil. R. Evid. 505(i)(4)(E)(i).

<sup>215</sup>Mil. R. Evid. 505(i)(4)(E).

<sup>216</sup>18 U.S.C. app. § 7 (1982)(CIPA).

<sup>217</sup>R.C.M. 908.

<sup>218</sup>Mil. R. Evid. 505(j)(5). If the court-martial is to receive evidence in closed session, this subsection requires that the military judge, counsel, and members have appropriate clearances. *But cf.* The Chief Justice's Security Procedures, *supra* note 79, § 4 (federal judges and jurors not required to have security clearances). First and sixth amendment implications when closing courts-martial are discussed *infra* text accompanying notes 274-405.

authorizing less than full disclosure at trial, the defense could likewise move for full disclosure at closed sessions. Thus, resolution of conflicts over full disclosure at the court-martial proceeding itself presents little difficulty.

Greater difficulties arise when the government moves to prevent full disclosure of classified information not only at trial, but also to the defense. As previously noted, both the Classified Information Procedures Act and Rule 505 authorize the government to submit material in support of other than full disclosure for the judge to consider alone.

Relying on *Alderman v. United States*,<sup>219</sup> the defense should always object to any ex parte, in camera examination of classified information by the military judge as violative of the accused's right to due process and right to effective assistance of counsel. In *Alderman*, the Supreme Court rejected the government's proposal that the trial judge screen recording tapes of conversations and then authorize the disclosure of "arguably relevant" conversations to the accused.<sup>220</sup> The government conceded that the taped conversations were the product of unlawful wiretaps. The Court held that the "task is too complex, and the margin for error too great to rely wholly on the in camera judgement of the trial court."<sup>221</sup> The Court further observed that "the need for adversary inquiry is great where increased by the complexity of the procedure and consequent inadequacy of ex parte proceedings."<sup>222</sup> Frequently, only defense counsel knows how each bit of evidence fits in his theory of the case.

*Alderman* was a consolidation of cases, including an espionage conviction.<sup>223</sup> Although the defendant had not been a party to all the recorded conversations and therefore was seeking access to information that had never been disclosed to him, the majority opinion rejected in camera screening by the court. Instead, the court directed release of all the tapes subject to a protective order where appropriate.<sup>224</sup> Commenting on the inadequacy of this procedure, Judge Harlan noted: "It is quite a different thing to believe that a defendant who probably is a spy will not pass on to the foreign power any additional information he has received."<sup>225</sup>

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<sup>219</sup> 394 U.S. 165 (1969).

<sup>220</sup> *Id.* at 181.

<sup>221</sup> *Id.* at 182.

<sup>222</sup> *Id.* at 184.

<sup>223</sup> In *United States v. Ivanov*, the accused was convicted of conspiring to transmit to the Soviets information relating to national defense in violation of 18 U.S.C. 794(a) and (c). *Id.* at 169.

<sup>224</sup> *Id.* at 185.

<sup>225</sup> *Id.* at 198.

Later that term, in a per curiam decision, the Supreme Court retreated from its apparent rejection of in camera, ex parte process. In *United States v. Taglianetti*,<sup>226</sup> the court decided that "[n]othing in [Alderman et al.,] . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by electronic surveillance."<sup>227</sup> Whether full disclosure was required depended on the likelihood that the court could make an accurate determination of the issue without the benefit of an adversary proceeding.<sup>228</sup> Thus, the test becomes whether the determination is so complex that an adversary proceeding is necessary. Applying this test, the Third Circuit Court of Appeals sustained subsequent ex parte screening by the court on remand in the Alderman companion cases involving classified information.<sup>229</sup>

More recent cases have embraced in camera hearings as a way to balance the accused's right to material, exculpatory evidence against possible privacy interests of the government, individuals, or organization. No per se rule exists. Rather the trial judge, in his or her discretion, determines whether the type of record and the nature of the state's interest in maintaining confidentiality are such that counsel and appellant should be barred from inspecting such information in camera.<sup>231</sup>

Where disclosure of classified information is requested, federal courts consistently have overruled challenges to in camera, ex parte proceedings, generally finding that the disclosure issues are not so complex as to require adversary proceedings. Under the Freedom of Information Act,<sup>232</sup> use of such procedures consistently has been sustained.<sup>233</sup> Of course, if a court errs in failing to disclose information, a plaintiff seeking information under the Freedom of Information Act has less at stake than does an accused. Despite this concern, under the Foreign Intelligence Surveillance Act of 1978,<sup>234</sup> use of ex parte, in camera procedures consistently has been upheld in connection with criminal proceedings.<sup>235</sup>

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<sup>226</sup> 394 U.S. 316 (1969).

<sup>227</sup> *Id.* at 317.

<sup>228</sup> *Id.*

<sup>229</sup> *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied sub nom. United States v. Ivanov*, 419 U.S. 881 (1974).

<sup>230</sup> *Pennsylvania v. Ritchie*, 107 S. Ct. 989 (1987); *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987).

<sup>231</sup> *Reece*, 25 M.J. at 95 n.6.

<sup>232</sup> 5 U.S.C. § 552 (1982).

<sup>233</sup> *Ponte v. Real*, 471 U.S. 491 (1985).

<sup>234</sup> 50 U.S.C. §§ 1801-1811 (1982).

<sup>235</sup> *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Megahey*, 553 F.Supp. 1180 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (2d Cir. 1983); *United States v. Horton*, 17 M.J. 1131 (N.M.C.M.R. 1984).

Under the Foreign Intelligence Surveillance Act, the government must seek, with a few exceptions, a court order from the United States Foreign Intelligence Surveillance Court before engaging in electronic surveillance for foreign intelligence purposes.”<sup>236</sup> To use evidence developed as a result of such surveillance in criminal proceedings, the United States Attorney General must approve and notice is sent to the court and the accused. The accused may challenge the legality of the intercept in federal district court; however, all materials in support of the electronic surveillance authorization may be reviewed *ex parte*, in camera by the court.<sup>237</sup> To date, no accused has successfully challenged either the *ex parte* procedure or any intercept.<sup>238</sup>

Similarly, under the Classified Information Procedures Act, courts have consistently sustained the *ex parte*, in camera review of classified information not already disclosed to the defense.” So to successfully challenge the absence of an adversary procedures, the defense must demonstrate that determinations of relevance and necessity are so complex that sufficient accuracy cannot be assured with only *ex parte* screening by the military judge. Of course, this is extraordinarily difficult to do without access to the information. In many instances, any claim of complexity will lack “concreteness” and be little more than “pure assertion.”<sup>240</sup>

Where the military judge fails to authorize full disclosure to the defense, military defense counsel should make a motion for appropriate relief<sup>241</sup> requesting that full disclosure be made to counsel, but not the accused. Full disclosure could be made to defense counsel subject to a protective order prohibiting counsel from disclosing the information to the accused. After disclosure to counsel, the military judge could then afford the defense an opportunity to articulate a need for further disclosure to the accused. Where counsel has been granted a security clearance and general access to specific classified programs, the government will be hard pressed to explain how disclosure to counsel has an adverse impact on national security.

In *United States v. Lopez*,<sup>242</sup> a district court limited disclosure when it excluded the defendant and the public, but not defense counsel,

<sup>236</sup> 18 U.S.C. § 1802 (1982).

<sup>237</sup> 18 U.S.C. §§ 1806(c), (d), (f) (1982).

<sup>238</sup> *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Megahey*, 553 F.Supp. 1180 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (2d Cir. 1983).

<sup>239</sup> *United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984); *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984); *United States v. Jolliff*, 548 F.Supp. 229 (D. Md. 1981).

<sup>240</sup> *Belfield*, 692 F.2d at 148.

<sup>241</sup> R.C.M. 906.

<sup>242</sup> 328 F.Supp. 1077, 1088 (E.D.N.Y. 1971).

during testimony about airline hijacker profiles. The court indicated that if counsel could articulate a need for discussing the profile with his client, the court would reevaluate its decision preventing disclosure to the **accused**.<sup>243</sup> Similarly, where the military judge authorizes other than full disclosure, counsel should request full disclosure for only themselves, not the accused.

Lastly, where the government submits materials explaining why classified information must not be disclosed to the accused to the military judge for consideration *ex parte*, the defense should likewise submit a detailed argument, for *ex parte* consideration, explaining why the undisclosed classified information is relevant and necessary to the defense. This can prevent premature disclosure of defense theories, and fairly puts the parties on a more equal footing. Neither the Classified Information Procedures Act nor Rule 505 expressly authorize *ex parte* motions by the defense. Nonetheless, under the Classified Information Procedures Act, the trial court employed precisely this procedure in *United States v. Clegg*.<sup>244</sup> Similarly, in *United States v. Jenkins*,<sup>245</sup> where the government claimed privilege with respect to the location of a surveillance site in a drug case, a district court directed the government to disclose the site to counsel with a protective order prohibiting disclosure to the accused or anyone else absent the court's further authorization.

To summarize, government requests for *in camera*, *ex parte* review of classified documents and materials in support of other than full disclosure can place the accused at a significant disadvantage where complexity makes an accurate *ex parte* determination less probable. The defense should always seek full disclosure for the accused. Proposing that only cleared counsel review the evidence as was done in *Lopez* and *Jenkins* is a workable alternative. As a last resort, the defense should file *ex parte* responses to government *ex parte* efforts to prevent other than full disclosure.

Fairness requires that, unless extraordinary factors are present, trial courts should decline to consider *ex parte* motions.

#### *7. Substantive Balancing of the Claim of Privilege versus the Defense Need for the Information.*

Military Rule of Evidence 505 provides that classified information is privileged from disclosure "unless the information is relevant and

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<sup>243</sup> *Lopez*, 328 F.Supp. at 1090; see also *United States v. Bell*, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972).

<sup>244</sup> 740 F.2d 16 (9th Cir. 1984).

<sup>245</sup> 530 F.Supp. 8, 9 (D.D.C. 1981).



necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."<sup>246</sup> No military courts have construed this language, and the Classified Information Procedures Act does not include any codification of the standard to be applied in weighing government claims that classified information is privileged from disclosure.<sup>247</sup> Federal courts that have considered what standard to apply to claims that classified information<sup>248</sup> is privileged have turned to cases where the government claims that an informant's identity is privileged from disclosure.<sup>249</sup>

In *Rovario v. United States*,<sup>250</sup> the Supreme Court examined a government claim that the identity of an informant who received heroin from the accused was privileged from disclosure in a prosecution related to the heroin transfer. While in *Rovario* the Court rejected the claim that the informant's identity was privileged, the Court established a balancing test that calls for weighing "the public interest in protecting the flow of information [to the police] against the individual's right to prepare his defense."<sup>251</sup> The Court also held the accused's interest in disclosure prevails when "disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."<sup>252</sup>

Federal courts have sustained government claims of privilege at suppression hearings where police officers testify about an informant's track record as informant.<sup>253</sup> Similarly, the government has avoided disclosing the exact location of an observation or surveillance post<sup>254</sup> as well as the location of hidden electronic eavesdropping devices.<sup>255</sup> And the government need not disclose other sensitive law enforcement or crime prevention techniques, including hijacker

<sup>246</sup>Mil. R. Evid. 505(i)(4)(B).

<sup>247</sup>See 18 U.S.C. app. §§ 1-16(1982) (CIPA).

<sup>248</sup>*United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985); *United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984).

<sup>249</sup>See *Rovario v. United States*, 353 U.S. 53 (1957) and its progeny.

<sup>250</sup>353 U.S. 53 (1957).

<sup>251</sup>*Id.* at 62.

<sup>252</sup>*Id.* at 60-61.

<sup>253</sup>*United States v. Pitt*, 382 F.2d 322 (4th Cir. 1967)(warrant also contained verified details).

<sup>254</sup>*United States v. Harley*, 682 F.2d 1018 (D.C. Cir. 1982)(jury saw actual videotape of what the officers saw, but the location of the surveillance site was not disclosed). *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981); *United States v. Jenkins*, 530 F.Supp. 8, 9 (D.D.C. 1981).

<sup>255</sup>*United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986)(jury listened to the audio tapes).

profiles<sup>256</sup> or the hidden location of motor vehicle track sheets containing serial numbers of parts.<sup>257</sup>

In each instance where courts have sustained government claims that informant identities or surveillance locations were privileged, they have decided that the requested information is not helpful to the defense. This determination is neither complex nor difficult in most cases. For example, where the jury sees a video tape of the actual drug transaction, the apartment from which it is filmed becomes immaterial even though the defense asks about the exact location of the observation post for the purpose of showing that the police officer's view was **obstructed**.<sup>258</sup> Similarly, the location of wiretap, which is ordinarily relevant and necessary if an expert witness testifies about audio distortion, becomes immaterial if, judging for itself, the trier of fact listens to the recorded **conversations**.<sup>259</sup>

Yet, in some instances, the defense cannot show that it needs certain information unless it first gets the privileged information. For example, at a suppression hearing a police officer testifies about evidence supplied by an informant resulting in arrest or search. Without knowing who the informant is, it is virtually impossible to effectively cross-examine the officer with any specificity concerning the informant's track record. The defense needs first, to know who the informant is and, second, to have the opportunity to independently investigate the matter. Without this information, the defense is simply stuck with the police officer's testimony, which may not be truthful or accurate. Yet, in this very instance disclosure is not **required**.<sup>260</sup>

Despite this dilemma, courts have consistently struck the balance in favor of the **government**.<sup>261</sup> The accused must offer more than speculation before a court will find that an accused's interest in disclosure **prevails**.<sup>262</sup> Before ordering disclosure, the court must find that the informer's testimony is "highly **relevant**."<sup>263</sup>

<sup>256</sup>*United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972); *United States v. Lopez*, 328 F.Supp. 1077 (**E.D.N.Y.**1971).

<sup>257</sup>*United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978).

<sup>258</sup>*Harley*, 682 F.2d at 1020.

<sup>259</sup>*Van Horn*, 789 F.2d at 1508.

<sup>260</sup>*McCray v. Illinois*, 386 U.S. 300 (1966) (informant's identity remained privileged where defense needed disclosure not in connection with guilt or innocence, but only for probable cause determination).

<sup>261</sup>*United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (disclosure not required although no other way to determine if the informant possesses relevant information); *United States v. Bennett*, 3 M.J. 903 (A.C.M.R. 1977); *see* Wellington, *In Camera Hearings and the Informant Identity Privilege Under Military Rule of Evidence 507*, *The Army Lawyer*, Feb. 1983, at 9.

<sup>262</sup>*United States v. Grisham*, 748 F.2d 460 (8th Cir. 1984); *United States v. Pantohan*, 602 F.2d 855 (9th Cir. 1979); *United States v. Skeens*, 449 F.2d 1066 (D.C. Cir. 1971).

<sup>263</sup>*Valenzuela-Bernal*, 458 U.S. at 870-71.

Also, the privilege does not necessarily give way because the accused knows who the informant is.<sup>264</sup> The government may still have a significant interest in protecting the informant's identity from further disclosure.<sup>265</sup> In addition, even if the informant's identity is well known, the government may have an interest in protecting the informant's location or address from disclosure.<sup>266</sup>

Turning to government claims that classified information is privileged from disclosure, it makes sense to have courts likewise balance the government's interest in nondisclosure against the accused's need for the information. Under the Classified Information Procedures Act, the two federal circuits that have considered the issue have applied the balancing test of *Rovario*.<sup>267</sup>

In *United States v. Smith*,<sup>268</sup> a former military intelligence officer, charged with espionage in Federal district court, sought to introduce classified information concerning operations that he had participated in two years before the alleged offenses. This evidence was unquestionably relevant to his later-successful defense that he mistakenly thought that he was acting as double agent for the United States when he passed classified information to the Soviets. Noting that "[t]he government has a substantial interest in protecting sensitive sources and methods of gathering information,"<sup>269</sup> the Fourth Circuit remanded the case to have the district court test for more than relevance by balancing the public interest in nondisclosure versus the accused's interest in disclosure.<sup>270</sup> Unfortunately, the court said little more, other than to indicate that the government had a substantial interest in protecting classified information.

Any military court applying the Rule 505 classified information privilege standard, will likely turn to *Rouario* and, in particular, to

<sup>264</sup> *United States v. Hargrove*, 647 F.2d 411, 414 (4th Cir. 1981).

<sup>265</sup> *Id.*

<sup>266</sup> *United States v. Tenorio-Angel*, 756 F.2d 1505 (11th Cir. 1985); *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983).

<sup>267</sup> *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985); *United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984). While the federal courts have adopted the Rule 505 standard of necessary and relevant, it is unclear whether this is consistent with the legislative history of the Classified Information Procedures Act. The Senate reported, "It should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information." S. Rep. No. 823, *supra* note 139, at 9. But the Conference Report provided that "on the question of a standard for admissibility of evidence at trial, the committee intends to retain current law." H. Conf. Rep. 1436, *supra* note 150 at 8. Since the applicable standard is "relevant and necessary" under Military Rule of Evidence 505, there is no need to dwell on this inconsistency.

<sup>268</sup> 780 F.2d 1102 (4th Cir. 1985).

<sup>269</sup> *Id.* at 1108.

<sup>270</sup> *Id.* at 1110.

*Smith*. Under Rule 505, however, where the government seeks to prevent disclosure of classified information to the defense altogether, it may articulate its interest in nondisclosure by motions considered *ex parte*, in camera by the military judge. Because the judge need only make findings where disclosure at trial is directed,<sup>271</sup> a decision authorizing other than full disclosure could be made essentially without explanation. Clearly, if this procedure is followed, no meaningful guidelines involving classified information will develop.<sup>272</sup> As discussed previously, to avoid this problem, the military judge should require that materials in support of claims of privilege be disclosed to at least defense counsel. Alternatively, the materials should be summarized in a fashion to reduce or eliminate particularly sensitive classified information.

In those instances where the defense seeks to disclose at trial classified information already known to the accused, the military judge must consider that disclosure of classified information could be made at sessions closed to the public.<sup>273</sup> At these sessions, the government would have a very limited interest in preventing properly cleared members from gaining access.

Thus, because in military practice court-martial sessions can be closed to the public, there is simply little need for the government to claim that classified information is privileged from disclosure. Where the defense establishes relevance and the slightest need, military judges should authorize disclosure at closed sessions. Then, the military judge should make a second determination balancing the government's interest in nondisclosure at sessions open to the public. Considering the availability of disclosure at closed sessions, the military judge is left with balancing the interest of the government in nondisclosure against interests of the accused and society in a public trial.

#### **IV. THE RIGHT TO A PUBLIC TRIAL AND THE CLOSING OF COURTS- MARTIAL FOR SECURITY**

Assuming that security clearances and access have been granted to the defense and that at least some classified information is relevant and necessary to the prosecution or the defense during the merits of

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<sup>271</sup> Mil. R. Evid. 505(i)(4)(C).

<sup>272</sup> See *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984) (trial court order requiring disclosure affirmed without explanation as to relevance and necessity of the classified information).

<sup>273</sup> Mil. R. Evid. 505(j).

a case, the issue of closing sessions to the public is raised. This section of the article examines a third ingredient of a fair trial—the right to a public trial. Again, this is another right expressly guaranteed by the sixth amendment of our Constitution.<sup>274</sup>

## A. HISTORICAL BACKGROUND

Generally regarded as basic right stemming from “the ancient privileges of Englishman,” the right to a public trial is widely regarded as a safeguard against the excesses of the Star Chamber Courts of the seventeenth century.<sup>275</sup> By having trials open to the public, it has been assumed that government officials would be more reluctant to unfairly prosecute innocent citizens.<sup>276</sup> Thus, public trials serve as a check against possible judicial abuse.<sup>277</sup> The carnival atmosphere attendant to some public trials does little to enhance fair outcomes, however.<sup>278</sup>

It has also been assumed that another reason for open trials is that witnesses are more likely to tell the truth in public than in private.<sup>279</sup> But, in many instances, witnesses may be more likely to disclose embarrassing or unpopular evidence in private rather than testifying candidly and completely in public.

A third reason for having public trials is that by chance witnesses with relevant information might attend the trial and then step forward with testimony refuting or corroborating evidence presented in public. While it is conceivable that this may have happened in small communities back when certain trials were also social events, it is fanciful to suggest that a witness with access to classified information would fortuitously appear at a trial to supply relevant classified information.

The last and certainly best reason for having public trials is that they encourage public confidence in judicial determinations. Apart from assuring that individual cases are correctly decided, a free society has a fundamental interest in learning about and discussing what transpires in court. As one court observed: “Secret hearings—

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<sup>274</sup>The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI.

<sup>275</sup>Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 381 (1932).

<sup>276</sup>See *United States v. Oliver*, 333 U.S. 257 (1948).

<sup>277</sup>*Id.* at 270.

<sup>278</sup>See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (trial judge’s failure to protect accused from extensive pretrial publicity violated due process); *Estes v. Texas*, 381 U.S. 532 (1965) (filming of trial itself for daily news broadcasts violated due process).

<sup>279</sup>See 3 Blackstone, *Commentaries*, \*375; Hale, *History of the Common Law of England* 343 (about 1670) (Runninton ed. 1820).

though they may be scrupulously fair in reality — are suspect by nature.”<sup>280</sup> In short, society has an interest in seeing justice done.

Even though both the United States Constitution and many state constitutions<sup>281</sup> guarantee the right to a public trial, only a few federal courts had addressed the right to a public trial prior to the World War II.<sup>282</sup> In 1917, the Eighth Circuit broadly construed the term “public trial” as “a trial at which the public is free to attend.”<sup>283</sup> But there was a split between circuits as to whether an accused need show actual prejudice where portions of a trial were closed to the public.<sup>284</sup>

## ***B. UNITED STATES V. OLNER***

The Supreme Court first addressed the public trial issue in *United States v. Oliver*.<sup>285</sup> The Supreme Court reversed a criminal contempt conviction of a defendant tried at a secret trial before a judge who, while serving as a one-man grand jury authorized under state law, concluded that the accused was lying. The defendant was tried in secret without the opportunity to consult with counsel.<sup>286</sup> Because of state grand jury secrecy rules, the accused had no opportunity to confront the other witnesses who had testified against him.<sup>287</sup> Moreover, only a portion of the record of the proceedings against the accused were transcribed for appellate review.<sup>288</sup> The Supreme Court held that, because the accused had no reasonable opportunity to defend himself, the conviction violated due process.<sup>289</sup>

Notwithstanding the holding, most of the opinion focused on the secret trial aspects of the case. The Court noted that, with perhaps the exception of courts-martial, there was no instance of a criminal trial having been conducted in camera.<sup>290</sup> The Court conducted a historical analysis, stating that “by immemorial usage, whenever the common law prevails, all trials are in open court, to which spectators are admitted.”<sup>291</sup>

<sup>280</sup>*United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

<sup>281</sup>*See United States v. Oliver*, 333 U.S. 257, 267-68 nn. 15-20 (1948).

<sup>282</sup>*See United States v. Buck*, 24 Fed. Cases 1289 (No. 14,680)(E.D. Pa. 1860) (trial excluding blacks should have been open to the public).

<sup>283</sup>*Davis v. United States*, 247 F. 394, 395 (8th Cir. 1917).

<sup>284</sup>*Id.* at 398-99 (prejudice presumed where trial closed to the public); *Reagan v. United States*, 202 F. 488 (9th Cir. 1913) (accused must show actual prejudice).

<sup>285</sup>*United States v. Oliver*, 333 U.S. 257 (1948).

<sup>286</sup>*Id.* at 259.

<sup>287</sup>*Id.*

<sup>288</sup>*Id.* at 263-64.

<sup>289</sup>*Id.* at 273.

<sup>290</sup>*Id.* at 266 n.12.

<sup>291</sup>*Id.* at 266.

The opinion made no mention of whether the press and public had an independent first amendment interest in attending criminal trials.<sup>292</sup> And because of the egregious due process defects with *Oliver* at trial, it was impossible to determine the exact extent of the accused's public trial right.

### ***C. POST-OLIVER PUBLIC TRIAL DEVELOPMENTS***

Shortly after *Oliver*, the Third Circuit held that the sixth amendment precluded the indiscriminate exclusion of the public from the trial of several accused charged with transporting women for immoral purposes in violation of the Mann Act.<sup>293</sup> Spectators, including young girls, filled the courtroom.<sup>294</sup> The trial court made no effort to narrow its order excluding the entire public; and, over the objection of one defendant, the court was cleared entirely of spectators.<sup>295</sup> Leaving open the issue of excluding the public to protect tender-aged witnesses from embarrassment, the Third Circuit reversed, holding that accused's the sixth amendment right to a public trial precluded such a general exclusion.<sup>296</sup>

In another case, the Third Circuit also held that the right to a public trial accrues chiefly to the accused, and that he could waive that right.<sup>297</sup> Where the public was excluded, except for the members of the press and relatives and friends of the accused and child witnesses, the Ninth Circuit sustained the order, holding that "the Sixth Amendment right to a public trial is a right of the accused, and of the accused only."<sup>298</sup>

Though the courts first focused on the accused's right to a public trial, they gradually began to recognize that the public had an interest in public trials separate and distinct from that of the accused. Where the right to waive a jury trial was at issue, the Supreme Court implicitly recognized society's interest in a public trial by noting that the accused had no right to a closed trial.<sup>299</sup>

<sup>292</sup> U.S. Const. amend. I.

<sup>293</sup> *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949).

<sup>294</sup> *Id.* at 920.

<sup>295</sup> *Id.* at 921.

<sup>296</sup> *Id.* at 923.

<sup>297</sup> *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949) (tried jointly with *Kobli*; accused's counsel expressly waived any objection to excluding the public).

<sup>298</sup> *Giese v. United States*, 262 F.2d 151 (9th Cir.), *cert. denied*, 361 U.S. 842 (1959); see also *Tribune Review Publishing Co. v. Thomas*, 153 F.Supp. 486, 495 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958) (right to a public trial is for accused's benefit).

<sup>299</sup> *Singer v. United States*, 380 U.S. 24, 35 (1965).

In *Lewis v. Peyton*,<sup>300</sup> the Fourth Circuit reversed a conviction where a trial moved to the remote, rural home of a bedridden eighty-seven year old rape victim. The Court held that the accused could not waive his right to a public trial.<sup>301</sup> The court observed that public trials were for the sake of the public, as well as the accused.<sup>302</sup> Similarly, noting that it was crucial for the public to know what transpires during police station interrogations, the Third Circuit reversed where the public was excluded from a hearing on the admissibility of a confession.<sup>303</sup>

Thus, the federal courts began balancing the interests of society and the accused in a public trial against any competing interest in a less than fully public trial. In *United States ex rel. Orlando v. Fay*,<sup>304</sup> a partial exclusion of the public was sustained as an “acceptable balance” between the interest in having an open trial and closing the courtroom.<sup>305</sup> In *Fay*, the judge removed spectators except members of the press to protect witnesses and jurors from harassment and intimidation.<sup>306</sup> Similarly, where some outsiders were permitted to remain as well as the press, the Second Circuit sustained a trial judge’s exclusion of most of the spectators to protect a witness who had declined to testify in front of, in his own words, the “gang in the courtroom.”<sup>307</sup>

Balancing the privacy interest of the accused against the general interest in a public trial, the Third Circuit unsealed transcripts of closed proceedings challenging the lawfulness of wiretaps after determining that the accused had no privacy interest in the contents of lawful intercepts.<sup>308</sup> Where a trial court failed to hold a hearing to balance the competing interests, a conviction was still upheld where the appellate court took judicial notice of the government’s interest in closing the court during the testimony of police agents still engaged

<sup>300</sup> 352 F.2d 791 (4th Cir. 1965).

<sup>301</sup> *Id.* at 792.

<sup>302</sup> *Id.*

<sup>303</sup> *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969) (en banc).

<sup>304</sup> 350 F.2d 967 (2d Cir. 1965), *cert. denied sub nom. Orlando v. Follette*, 384 U.S. 1008 (1986).

<sup>305</sup> *Id.* at 971.

<sup>306</sup> *Id.* But see *Harris v. Stephens*, 361 F.2d 888, 891 (8th Cir. 1966) (no balancing of competing interests in capital case where “[c]losing of the courtroom during the testimony of the victim [was] . . . a frequent and accepted practice when the lurid details of such a crime must be related by a young lady”).

<sup>307</sup> *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970); see also *United States v. Eisner*, 533 F.2d 987 (6th Cir. 1976) (without evidentiary hearing judge cleared all but members of the press during one witness testimony where the witness feared spectators).

<sup>308</sup> *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978).



in undercover police work.<sup>309</sup> Partial exclusion of the public where a minister and members of the press were permitted to remain in the courtroom during the testimony of a rape victim has also been sustained.<sup>310</sup>

Finally, in a plurality decision, the Supreme Court held that there was a First Amendment interest of the press in access to criminal trials that must be balanced against the right of the accused to a fair trial. In *Gannett Co., Inc. v. De Pasquale*,<sup>311</sup> the accused, trial judge, and prosecutor all agreed to close preliminary hearings from the press and public.<sup>312</sup> Noting that pretrial publicity of suppression hearings posed special risks of unfairness, the Court sustained closing the proceedings where a reasonable probability of prejudice existed.<sup>313</sup>

In *Richmond Newspapers, Inc. v. Virginia*,<sup>314</sup> the Court addressed the right of public access at the trial proper, as opposed to pretrial proceedings. While the Court had earlier reversed convictions where there was too much publicity and public access,<sup>315</sup> here the Court held that the right to attend criminal trials was "implicit in the guarantees of the First Amendment."<sup>316</sup> The Court required that the trial judge must articulate an overriding interest before excluding the public.<sup>317</sup>

Since *Richmond Newspapers*, the Court has required an articulated overriding interest in closing proceedings, notwithstanding a state statute requiring closure. In *Globe Newspapers v. Superior Court*,<sup>318</sup> the state advanced two interests protected by a state statute that required closing the court during the testimony of rape victims under age eighteen. First, the state urged that the statute enabled young witnesses who could not testify before an audience to testify under

<sup>309</sup>United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975).

<sup>310</sup>United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 937 (1975) (tailored exclusion of public reduced aggravating the original injury by alleviating need for the rape victim to describe the "unwanted sexual encounter before persons with no more than a prurient interest"); *see also* Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984) (public, except members of the press and family members of the accused, the victim-witness, and the decedent excluded during testimony of the victim who had been raped and whose husband had been murdered).

<sup>311</sup>*Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979).

<sup>312</sup>*Id.* at 375.

<sup>313</sup>*Id.* at 378.

<sup>314</sup>448 U.S. 555 (1980).

<sup>315</sup>*Sheppard v. Maxwell*, 384 U.S. 333 (1966) (trial judge's failure to protect accused from massive pretrial publicity violated due process); *Estes v. Texas*, 381 U.S. 532 (1965) (filming of trial itself for daily news broadcasts violated due process).

<sup>316</sup>*Estes*, 381 U.S. at 580.

<sup>317</sup>*Id.* at 581.

<sup>318</sup>*Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982).

less traumatic circumstances. The Supreme Court rejected the mandatory requirement, holding that there must be an individualized determination that closure is necessary to protect the witness.<sup>319</sup> Second, the state argued the statute encouraged victims and their parents to come forward because they would know that the tender-aged victim would not have to testify in open court. Noting a lack of empirical evidence and relying on common sense, the Court rejected this argument, too.<sup>320</sup>

In *Press Enterprise v. Superior Court (Press Enterprise I)*,<sup>321</sup> where the public was excluded from individual, but not general, voir dire, the Court remanded for a determination as to each juror's privacy interest before release of the transcripts of the proceedings.<sup>322</sup> The Court held that "[t]he presumption of openness can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."<sup>323</sup> Again, the Court was narrowing a broad denial of public access. Furthermore, the Court has extended the requirements of *Press Enterprise I* to challenges raised by the accused as well as the press.<sup>324</sup>

From these cases, particularly *Press Enterprise I*, several conclusions can be drawn. First, the accused, prosecutor, and judge cannot simply agree to close the proceedings. Second, before denying the public full access to a criminal proceeding, the court must consider alternatives, including partial exclusion of the public or, in case of broad publicity problems, sequestration of the jury. Third, the judge must articulate in findings what overriding interest is being protected by closure. And, last, the closure must be as narrow as possible.

## D. PUBLIC TRIALS IN THE MILITARY

While our courts-martial system is rooted in the same Anglo-Norman system in which courts were open and prosecutions were "public and verbal,"<sup>325</sup> historically courts-martials retained the discretion to remain closed to the public. Noting that in the majority of cases "the Court is pronounced by the President to be open . . . to the public," Colonel Winthrop, reporting on nineteenth century military practice,

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<sup>319</sup>*Id.* at 608.

<sup>320</sup>*Id.* at 609.

<sup>321</sup>464 U.S. 501 (1984).

<sup>322</sup>*Id.*

<sup>323</sup>*Id.* at 510.

<sup>324</sup>*Waller v. Georgia*, 467 U.S. 39 (1984).

<sup>325</sup>J. Snedeker, *A Brief History of Courts-Martial* 10 (1954).

observed that "at any stage of the trial it may be permanently closed at the discretion of the court."<sup>326</sup>

Yet, in the early unofficial and official Manuals for Courts-Martial, there is no mention of excluding the public from courts-martial except during deliberations.<sup>327</sup> The 1917 Manual first expressly authorized courts-martial, in their discretion, to close the proceedings to the public.<sup>328</sup> This provision was later revised to authorize the convening authority to direct whether proceedings were to be closed; the convening authority, however, needed "good reasons" for closing a courts-martial.<sup>329</sup> In 1949, the Manual expressly authorized closing courts-martial for security reasons.<sup>330</sup> Similar language appeared in the 1951

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<sup>326</sup> Winthrop, *supra* note 18, at 161. Citing an 1869 courts-martial, The Judge Advocate General of the Army noted:

Except, however, when temporarily closed for deliberations, courts-martial in this country are almost invariably open to the public during trial. *R. 29, 34*, June 1869. But in a particular case where the offenses charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. *C. 1637, Aug., 1865*; *GCM Record No. 55974*.

Digest of Opinions of the Judge Advocate General 516 (1912).

<sup>327</sup> Murray, Manual for Courts-Martial 30 (3d ed. 1893); Manual for Courts-Martial and of Procedure Under Military Law 23 (2d ed. 1898); Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of Other Procedures Under Military Law 24 (1905); Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of Other Procedures Under Military Law 24 (1908) (judge advocate conducts the case for the government in open session); Department of Army Regulations likewise make no mention of excluding the public from courts-martial except during deliberations. *See, e.g., Regulations for the Army of the United States No. 921* (1895) (judge advocate withdraws during closed sessions); *Regulations for the Army of the United States No. 970* (1904 for amendments to Dec. 31, 1905) (after a finding of guilty, court reopened to receive evidence).

<sup>328</sup> Manual for Courts-Martial, Courts of Inquiry, and of Other Procedures Under Military Law, 1917, para. 92.

<sup>329</sup> Concerning public trials, the 1928 Manual provided:

Excluding Spectators.—Subject to the directions of the appointing authority, a court-martial is authorized either to exclude spectators altogether or to limit their number. In the absence of good reason, however (e.g., where testimony as to obscene matters is expected), courts-martial will sit with doors open to the public.

Manual for Courts-Martial, 1928, para. 49e.

<sup>330</sup> Paragraph 49e of the 1949 Manual reads as follows:

Spectators—Except for security or other good reasons, as when testimony as to obscene matters is expected, the sessions of courts-martial will be open to the public. When practicable, notice of the time and place of sessions of courts-martial will be published in such a manner that persons subject to military law may be afforded opportunity to attend as spectators provided attendance does not interfere with the performance of their duties.

Manual for Courts-Martial, U. S. Army, 1949, para. 49e.

Manual,<sup>331</sup> which implemented the Uniform Code of Military Justice.<sup>332</sup>

In 1969, the provision concerning spectators was further revised, but still authorized the closing of courts-martial for security reasons. ~~For the first time~~, the Manual expressly called for a balancing of the accused's right to a public trial against the government's interest in closing the proceedings.<sup>334</sup> Only to prevent the disclosure of classified information could an entire trial be completely closed.<sup>335</sup>

In the 1984 Manual, Rule for Courts-Martial 806 replaced the previous Manual provisions concerning spectators. Courts-martial are still generally open to the public.<sup>336</sup> For good cause, the military judge, and no longer the convening authority, may reasonably limit the number of spectators or close a session, but only when expressly authorized elsewhere in the Manual can the military judge close a session over the objection of the accused.<sup>337</sup> And, in cases involving the

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<sup>331</sup>The 1951 *Manual* also addressed photographing or broadcasting proceedings. *It* read as follows:

*Spectators; publicity.* — As a general rule, the public shall be permitted to attend open sessions of courts-martial. Unless otherwise limited by departmental regulations, however the convening authority or the court may, for security or other good reasons, direct that public be excluded from a trial. When practicable, notices of the time and place of sessions of courts-martial will be published so that persons subject to the code may be afforded the opportunity to attend as spectators provided attendance does not interfere with the performance of their duties. See *Also* 118 (Contempts).

The taking of photographs in the courtroom during an open or closed session of the court, or broadcasting the proceedings from the courtroom by radio or television will not be permitted without the prior written approval of the Secretary of the Department concerned

Manual for Courts-Martial, United States, 1951, para. 53e.

<sup>332</sup>10 U.S.C. §§ 801-940 (1982).

<sup>333</sup>MCM, 1969, para. 53e.

<sup>334</sup>The provision read, in part, as follows: "The authority to exclude [spectators] should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion." *Id.*

<sup>335</sup>*Id.*

<sup>336</sup>Rule 806 provides: "In general. Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, 'public' includes members of both the military and civilian communities." R.C.M. 806(a).

<sup>337</sup>The rule provides as follows:

*Control of Spectators.* In order to maintain the dignity and decorum of the proceeding or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

R.C.M. 806(b).

introduction of classified information, the Manual expressly authorized the exclusion of the public during portions of testimony disclosing classified information.<sup>338</sup>

Despite this express authority for closing court-martial sessions, there are few reported cases where the defense challenged closing of the court for security reasons.<sup>339</sup> In *United States v. Neville*,<sup>340</sup> the convening authority ordered a closed trial for a field grade officer on charges of adultery, false swearing, failures to repair, and derelictions of duty related to the filing of classified officer efficiency reports. Without mentioning the sixth amendment and only citing the Manual, the Army Board of Review sustained the closing of the entire court-martial.<sup>341</sup>

Not for another twenty-five years did a military appellate court address the issue of closing courts-martial to protect classified information.<sup>342</sup> Appellate courts examined closing of courts-martial and otherwise limiting public attendance in a variety of other circumstances, however.

In *United States v. Zimmerman*,<sup>343</sup> the Air Force Board of Review reversed an indecent exposure conviction where, over defense objection, the court excluded spectators, including the accused's mother, from the entire trial. Consistent with case law in federal courts,<sup>344</sup> the board held that excluding all spectators to protect witness "sensibilities" and to prevent embarrassment was not a "good reason," as required by the Manual.<sup>345</sup> Conversely, the Air Force board sustained the exclusion of the public during the testimony of a nine-year-old victim of sex offenses.<sup>346</sup>

In *United States v. Brown*,<sup>347</sup> the Court of Military Appeals reversed the accused's conviction for communicating indecent language where the convening authority had directed closing the court-martial except

<sup>338</sup> Mil. R. Evid. 505(j)(5).

<sup>339</sup> *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); *United States v. Neville*, 7 C.M.R. 180 (A.B.R. 1952).

<sup>340</sup> 7 C.M.R. 180 (A.B.R. 1952).

<sup>341</sup> *Id.* at 192.

<sup>342</sup> *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

<sup>343</sup> 19 C.M.R. 806 (A.F.B.R. 1955).

<sup>344</sup> *United States v. Sorrentino*, 175 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949) (right to a public trial may be waived; *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949) (general public has right to attend trial although witnesses may suffer embarrassment)).

<sup>345</sup> *Zimmerman*, 19 C.M.R. at 816.

<sup>346</sup> *United States v. Frye*, 25 C.M.R. 769 (A.F.B.R. 1957); *see also Giese v. United States*, 262 F.2d 151 (9th Cir. 1958) (per curiam), *cert. denied*, 361 U.S. 842 (1959) (exclusion of public during testimony of young child).

<sup>347</sup> 22 C.M.R. 41 (C.M.A. 1956).

for those persons specifically designated by the **accused**.<sup>348</sup> Because a civilian-type offense was involved, the court decided there was no reason for departing from civilian **rules**,<sup>349</sup> and relied extensively on *Oliver* in reversing. The Court of Military Appeals did note, however, that the Supreme Court had never decided a case where public disclosure of evidence endangered national **security**.<sup>350</sup>

*Brown* also stands for the important proposition that “in military law, unless classified information must be elicited, the right to a public trial includes the right of representatives of the press to be in **attendance**.”<sup>351</sup>

In *United States v. Grunden*,<sup>352</sup> the Court of Military Appeals again addressed closing courts-martial for security reasons. In *Grunden*, an airman was convicted of attempted espionage and failure to report contacts with individuals he believed to be hostile intelligence **agents**.<sup>353</sup> While about sixty per cent of the trial was open to the public, the government presented virtually all of its case on the espionage charge in closed **session**.<sup>354</sup> Of the ten witnesses who testified in closed session, four made no mention of classified information, three mentioned such information once, and only one discussed classified information at **length**.<sup>355</sup> Concluding that the military judge “employed an ax in place of the constitutionally required scalpel,” the Court of Military Appeals **reversed**.<sup>356</sup>

While the Court announced that it was requiring that trial judges employ a balancing **test**,<sup>357</sup> the procedures that the court prescribed will always result in the closing of proceedings during the introduction of properly classified **information**.<sup>358</sup>

To close the court-martial, trial counsel has the initial burden of demonstrating that the material to be presented in closed session has been properly classified by the appropriate authority in accordance with **regulation**.<sup>359</sup> The military judge does not conduct a de novo review of the classification decisions,<sup>360</sup> but rather decides whether

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<sup>348</sup>*Id.* at 44.

<sup>349</sup>*Id.* at 45.

<sup>350</sup>*Id.* at 46.

<sup>351</sup>*Id.* at 48.

<sup>352</sup>2 M.J. 116 (C.M.A. 1977).

<sup>353</sup>*Id.* at 119.

<sup>354</sup>*Id.* at 120.

<sup>355</sup>*Id.*

<sup>356</sup>*Id.*

<sup>357</sup>*Id.* at 121-22.

<sup>358</sup>*Id.* at 122-24.

<sup>359</sup>*Id.* at 123.

<sup>360</sup>*Id.* at 122.

classification determinations are arbitrary and capricious.<sup>361</sup> Precisely how the government satisfies its burden is not prescribed, but again it appears that the military judge may consider in camera, ex parte materials in reaching his decision.<sup>362</sup>

Additionally, the court directed that when only a portion of a witnesses testimony involved classified information, the government should bifurcate presentation of the testimony, with only the classified information being introduced in closed session.<sup>363</sup>

Thus, *Grunden* prescribes minimizing closed sessions to testimony involving classified information. Nevertheless, if the government need only demonstrate that a classification authority didn't abuse his discretion in deciding that disclosure of certain information might pose a reasonable danger to national security,<sup>364</sup> the government will invariably prevail in closing at least part of the proceedings. As with challenging claims of privilege, the defense is ill-equipped to dispute whether even "innocuous information" is properly classified,<sup>365</sup> let alone challenge whether information reveals valuable methods of operation.

In *United States v. Gonzalez*,<sup>366</sup> the latest case involving a challenge to closure of a court-martial for security reasons under paragraph 53e of the 1969 Manual,<sup>367</sup> the Air Force Court of Military Review sustained the conviction where the military judge followed *Grunden* and minimized the duration of closed sessions.

Rule for Courts-Martial 806 and Military Rule of Evidence 505(j) concerning the introduction of classified information have replaced the 1969 Manual provision that authorized closing of the *Grunden* court-martial.<sup>368</sup> Rule 505(j) is derived from both the administration's proposed classified information procedures bill<sup>369</sup> and *Grunden*.<sup>370</sup> Thus, *Grunden* remains applicable to sessions closed for classified information.

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<sup>361</sup> *Id.* at 123 n.14.

<sup>362</sup> *Id.* at 122 n.13. The court does not expressly mention whether the prosecution may submit materials to the military judge without disclosing their contents to the defense. The court, however, cites *United States v. Reynolds*, 345 U.S. 1 (1953), where the government submitted materials ex parte to the judge for in camera inspection.

<sup>363</sup> *Id.* at 123.

<sup>364</sup> See *supra* text accompanying notes 206-44.

<sup>365</sup> *CIA v. Sims*, 471 U.S. 159, 178 (1986).

<sup>366</sup> 12 M.J. 747 (A.F.C.M.R.1981), *aff'd*, 16 M.J. 428 (C.M.A. 1983).

<sup>367</sup> MCM, 1969, para. 53e.

<sup>368</sup> *Id.*

<sup>369</sup> H.R. 4745, *supra* note 146.

<sup>370</sup> Mil. R. Evid. 505 analysis.

Since *Grunden* and *Gonzalez*, there have been no cases in which the defense challenged the validity of closing courts-martial for security reasons.<sup>371</sup> Consistent with these cases, the Air Force Court of Military Review declined to close a court at the request of the accused where, during sentencing proceedings, the accused described the unpleasant conditions of pretrial confinement in a civilian jail.<sup>372</sup> On appeal, the court noted that, in courts-martial, "the right to a public trial is as full and complete as in civilian courts."<sup>373</sup> Citing *Richmond Newspapers*, the court indicated that an overriding interest, articulated in findings of fact, was a prerequisite to closing a courts-martial.<sup>374</sup>

In *United States v. Hershey*,<sup>375</sup> the Court of Military Appeals examined a military judge's decision to exclude the bailiff and the non-commissioned officer escorting the accused during the testimony of the accused's thirteen year-old daughter.<sup>376</sup> There were no other spectators at the accused's trial. Failing to follow *Globe Newspaper Co. v. Superior Court*,<sup>377</sup> the military judge closed the court without determining on an individual basis the maturity of the victim, the desires of the victim, or the interests of the accused and the rest of the victim's family. While the court affirmed, concluding that the practical impact of the closure was limited because the two excluded persons were performing a governmental function and were not attending as spectators,<sup>378</sup> the court cited *Globe Newspaper* and *Press-Enterprise* with approval.<sup>379</sup>

While neither *Hershey* nor any of the federal cases involved closure to protect classified information, application of *Press Enterprise I* should almost invariably result in closure of proceedings where classified information must be introduced under Military Rule of Evidence 505. This is true so long as the party seeking to introduce the classified information can establish that the alternatives to full disclosure of classified information authorized under the rule<sup>380</sup> are unsatisfactory.

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<sup>371</sup>Recent cases involving classified information but no challenge to Rule 505 include: *United States v. Baba*, 21 M.J. 76 (C.M.A. 1985) (accused convicted of wrongfully communicating classified information to foreign agents); *United States v. Baasel*, 22 M.J. 505 (A.F.C.M.R. 1986) (security officer sought to introduce evidence of his classified duties in connection with offenses related to his compulsive gambling); *United States v. Gaffney*, 17 M.J. 565 (A.C.M.R. 1983) (accused convicted of losing classified information through gross negligence).

<sup>372</sup>*United States v. Czarnecki*, 10 M.J. 570 (A.F.C.M.R. 1980) (per curiam).

<sup>373</sup>*Id.* at 571.

<sup>374</sup>*Id.* at 572.

<sup>375</sup>20 M.J. 433 (C.M.A. 1985).

<sup>376</sup>*Id.* at 435.

<sup>377</sup>457 U.S. 596 (1982).

<sup>378</sup>*Id.* at 437.

<sup>379</sup>*Id.* at 436-7.

<sup>380</sup>Mil. R. Evid. 505(h)(4)(D).



First, the overriding interest is, of course, the protection of national security. Again, as previously discussed, it is extraordinarily difficult to challenge classification determinations.<sup>381</sup>

Second, aside from the alternatives to disclosure of classified information provided for in Military Rule of Evidence 505, there is really no means of protecting the classified information from unauthorized disclosure, other than excluding the public. Excluding only a portion of the public still creates a security risk. Closure of the court must still be tailored so as to exclude the public from only those portions of the trial which actually involve the introduction or discussion of classified information.<sup>382</sup>

Third, before closing the court, the military judge should make written findings in support of the decision to close the court to aid in review and to comply with *Press-Enterprise I*. Furthermore, these findings can be kept under seal.<sup>383</sup>

### ***E. OTHER LIMITATIONS ON PUBLIC ATTENDANCE AT COURTS-MARTIAL.***

Other factors can, of course, limit public attendance at a courts-martial. The size of the courtroom, as well as its location, can effectively preclude or limit the attendance of the public.

Regarding courtroom size, it is well settled that a courtroom need only be reasonably large.<sup>384</sup> A trial is public if spectators are seated to courtroom capacity.<sup>385</sup> So long as spectators are excluded without particularity or favoritism, a courtroom with space for only eighteen spectators satisfied a marine's right to a public trial.<sup>386</sup>

More significantly, public attendance at courts-martial can be limited or completely foreclosed depending on the trial location. For example, transferring proceedings in part overseas could certainly dis-

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<sup>381</sup> See *supra* text accompanying notes 194-204.

<sup>382</sup> But see Mil. R. Evid. 505(j), which seems to provide for closing the courts-martial only during sessions in which classified information is introduced. If read literally, closing the court to hear closing arguments discussing classified information may not be authorized. Rule 505 should be amended to clearly authorize, when necessary, bifurcating each argument in two. A general, unclassified argument could be made in open court, and a more detailed argument containing classified information could be made in closed court.

<sup>383</sup> *In re* Washington Post, 807 F.2d 383 (4th Cir. 1986).

<sup>384</sup> *Estes v. Texas*, 381 U.S. 532 (1965).

<sup>385</sup> *Gaines v. Washington*, 277 U.S. 81, 86 (1981).

<sup>386</sup> *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973); see also *United States v. Gillars*, 182 F.2d 965 (D.C. Cir. 1950) (accused's treason conviction stemming from German radio broadcasts in which she participated sustained where only a limited number of earphones available for press and spectators to listen to the broadcasts).

courage attendance by the local public.<sup>387</sup> Military exigencies such as trying a case in a combat zone or on a ship at sea may likewise make public attendance of other than servicemembers impracticable.<sup>388</sup> Although only servicemembers may be able to attend such a trial, it is still public under the Manual.<sup>389</sup>

The issue becomes closer when the trial is held at a post or in a building where public access is restricted.<sup>390</sup> While the Air Force Court of Military Review has suggested that spectators are not authorized to be on post by virtue of a trial,<sup>391</sup> the better practice is to allow the public on post or in the restricted facility with escorts if necessary.<sup>392</sup> Otherwise, members of the press and general public can be precluded from attending, not because court sessions are closed, but because the general public cannot gain access to where the courtroom is.

## ***F. IN RE WASHINGTON POST CO.***

A complete analysis of closing courts-martial to protect classified information, requires an examination of *In re Washington Post Co.*<sup>393</sup> This is the only civilian federal case where the public was excluded from substantially all of the criminal proceedings—a plea hearing and a sentence hearing—against an accused. In a negotiated agreement between the United States and Ghana, the accused agreed to enter a plea of nolo contendere to two of eight counts of espionage stemming from his acquiring classified information from a low-level CIA employee in Ghana.<sup>394</sup> In exchange, the United States promised to jointly move for a suspension of the sentence so that the accused could be exchanged for individuals held in Ghana for alleged spying on behalf of the United States.<sup>395</sup>

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<sup>387</sup> See *Chenowith v. Van Arsdale*, 46 C.M.R. 183 (C.M.A. 1973) (holding that requirements of the sixth amendment were inapplicable to proceedings transferred, in part, to Subic Bay, Philippines to hear witnesses from the U.S.S. Ranger).

<sup>388</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 806 discussion [hereinafter R.C.M. 806 discussion].

<sup>389</sup> *Id.*

<sup>390</sup> See, e.g., *United States v. Gonzalez*, 12 M.J. 747 (A.F.C.M.R.1981), *aff'd*, 16 M.J. 428 (C.M.A. 1983) (trial held in a security facility where access to the public was restricted and all visitors required escorts).

<sup>391</sup> *United States v. Czarnecki*, 10 M.J. 570, 572 n. 3 (A.F.C.M.R. 1980) (per curiam).

<sup>392</sup> See *Gonzalez*, 12 M.J. at 748 (spectators allowed in Air Force base security office with escorts); *United States v. Longhofer*, GCM 11 (U.S. Army, Mil. D. Wash. 23 Sep. 86) (spectators granted access to and provided escort to courtroom located in a sensitive compartmented information intelligence facility).

<sup>393</sup> 807 F.2d 383 (4th Cir. 1986).

<sup>394</sup> *Id.* at 386.

<sup>395</sup> *Id.*

Both the plea hearing and sentence hearing were held in camera<sup>396</sup> with the pleadings and transcripts kept under seal.<sup>397</sup> On motion, the hearings were not reflected in the court docket. The government requested secrecy, urging that disclosure of the proceedings might jeopardize the exchange or pose a threat to those held in Ghana. After the accused departed the United States, the court released the hearing transcripts and motions, except for classified affidavits from the Acting Secretary of State and the Acting Attorney General.”

The Fourth Circuit found procedural and substantive error with the district court’s action. First, the circuit court found that, although required by *In re Knight Publishing Co.*,<sup>399</sup> the district court had failed to give adequate notice to the public of the pending closure nor had it taken reasonable steps to afford members of the public who wanted to attend an opportunity to comment upon or object to the closing of the court.<sup>400</sup>

Moreover, although required by both *Knight*<sup>401</sup> and *Press Enterprise I*,<sup>402</sup> the district court failed to articulate findings concerning the overriding interest supporting closure and the unavailability of alternatives to closing the court.<sup>403</sup> In accordance with *Press Enterprise II*,<sup>404</sup> the district court was required to make the following specific factual findings: “(1) closure serves a compelling interest; (2) there is a ‘substantial probability’ that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.”<sup>405</sup>

While these requirements have not been considered by any military court, there is, absent military exigencies, every reason to believe that these procedures will be required at courts-martial. In both *United States v. Grunden* and *United States v. Hershey*, the Court of Military Appeals fully embraced civilian federal law regulating the closing of criminal trials to the public, so there is little reason to expect future deviation.

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<sup>396</sup> Representatives from Ghana’s embassy attended, but a newspaper reporter was excluded from both hearings. *Id.* at 386-87.

<sup>397</sup> *Id.* at 397.

<sup>398</sup> *Id.* at 387.

<sup>399</sup> 743 F.2d 231 (4th Cir. 1984).

<sup>400</sup> 807 F.2d at 390.

<sup>401</sup> *Knight*, 743 F.2d at 234-35.

<sup>402</sup> 464 U.S. 501, 510-11 (1984).

<sup>403</sup> *Id.* at 391.

<sup>404</sup> 106 S.Ct. 2735, 2741-44 (1986).

<sup>405</sup> 464 U.S. at 392 (citation omitted).

## V. CONCLUSION.

Certainly, the government has a significant interest in protecting national security by preventing the unauthorized disclosure of classified information in connection with courts-martial. This interest is frequently at odds with the accused's fair trial interests. Procedures to protect classified information, including limiting defense counsel's access to classified information, claiming privilege with respect to specific items of classified information, and closing courts-martial to the public, can prevent the accused from receiving a fair trial.

While military procedures and case law attempt to strike a balance between these interests, the current law does not guarantee fairness. The standards in *United States v. Nichols*,<sup>406</sup> which requiring the granting of access to any counsel, should be reversed and replaced with a balancing test which examines the availability of other counsel who present no security risk.

Second, requiring the defense to provide notice of the classified information it intends to disclose at trial, without imposing a reciprocal obligation upon the government to disclose information it will use to rebut that classified information, is fundamentally unfair and constitutionally defective in view of *Wardius v. Oregon*.<sup>407</sup> Military Rule of Evidence 505 should be amended to provide for reciprocal discovery and until it is amended the government should be required to provide such discovery.

Third, absent truly extraordinary circumstances, the government should be barred from submitting for the military judges in camera review affidavits and materials ex parte in support of claims of other than full disclosure of classified information to the defense. It is virtually impossible to challenge a claim of privilege without at least knowing the general basis for the claim. Alternatives, such as disclosure to cleared counsel, but not the accused, afford the opportunity make a meaningful challenge.

Fifth, developments under the first and sixth amendments have complicated excluding the public from courts-martial. Prior to closing a session to protect classified information, the military judge must conduct a hearing and make specific findings addressing: (1) the compelling national security interest served by closure; (2) how closure protects that interest; (3) what alternatives to closure were considered and why they won't work. Moreover, unless clearly impractical, notice

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<sup>406</sup> *United States v. Nichols*, 8 C.M.A. 119, 23 C.M.R. 343 (1957).

<sup>407</sup> 412 U.S. 470 (1973).

and opportunity to object to closure should be provided to members of the public who could reasonably be expected to object.

Even with these procedures, however, the accused still faces a heavy burden. Applying the standards will invariably result in the closing of courts-martial during the presentation of information that is properly classified. Certain trials involving intelligence agents or special operators would be tried almost entirely in secret session, thereby depriving accused of a public trial.

The balancing procedures designed to protect both classified information and the accused right to be represented by counsel, to discover and present evidence in his defense, and to have a public trial, afford the accused little chance of successfully challenging classified information determinations. With the lack of intelligence experts available to the defense, the vague classification standards, and the deference the courts show to agency classification determinations, there is little indication that current classified information procedures guarantee fair trials.

## APPENDIX A

### PROPOSED CHANGE TO MILITARY RULE OF EVIDENCE 505

Military Rule of Evidence 505 is amended by inserting the following after subsection (i) (4) (E):

1 (F) *Reciprocity.*

2 (i) *Notice by the Government.* Whenever the military  
3 judge determines pursuant to subsection (i) (4) (C)  
4 that classified information, notice of which the  
5 accused provided pursuant to subdivision (h), may  
6 be disclosed in connection with a court-martial  
7 proceeding, the military judge shall, unless the  
8 interest of fairness do not so require, order the  
9 Government to provide the accused with  
10 information it expects to use to rebut the classified  
11 information.  
12

- 13 (ii) *Continuing duty to notify.* The military judge may  
14 place the Government under a continuing duty to  
15 disclose such rebuttal information.  
16
- 17 (iii) *Failure to comply.* If the Government fails to  
18 comply with the requirements of this subsection,  
19 the military judge may exclude any evidence not  
20 made the subject of notification and may prohibit  
21 the examination by the Government of any witness  
22 with respect to such information.  
23  
24



# UNITED STATES v. KUBRICK: SCOPE AND APPLICATION

by Major Carl M. Wagner"

## I. INTRODUCTION

A tort claim against the United States must be presented in writing to the appropriate agency within two years of accrual of the claim.<sup>1</sup> Furthermore, within six months of the denial of the claim, the claimant must begin an action in court. Failure to comply with these time limits is a jurisdictional bar to the claim.<sup>2</sup>

Although the time limits are clearly stated in section 2401(b) of the Federal Tort Claims Act (FTCA),<sup>3</sup> the Act does not define when a claim accrues. The lower federal courts developed tests with which to evaluate claim accrual. In *United States v. Kubrick*,<sup>4</sup> the United States Supreme Court rejected one of these FTCA claim accrual tests and established its own accrual standard, based on the claimant's knowledge of an injury and its cause.

Since *Kubrick*, the lower federal courts have answered several questions that the Supreme Court in *Kubrick* left unanswered. Specifi-

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<sup>2</sup>28 U.S.C. § 2401(b) (1982) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such a claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final determination of the claim by the agency to which it was presented.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*; 28 U.S.C. §§ 1346(b), 2671-2680 (1982). The Federal Tort Claims Act waives the sovereign immunity of the United States for certain tort claims.

<sup>5</sup>444 U.S. 111 (1979).



cally, what is the scope of the *Kubrick* accrual standard? What degree and type of knowledge does the standard require to trigger the running of the statute of limitations? Additionally, the courts determined that the standard has both an objective and a subjective component. They also modified the standard to fit different fact situations. Finally, the courts determined when the *Kubrick* standard requires deferral of claim accrual based on government conduct.

The courts have not uniformly interpreted and applied the standard. This paper traces the evolution of the *Kubrick* accrual standard. It reviews several lower federal court interpretations of the *Kubrick* standard, and evaluates whether the courts properly applied it.

## 11. PRE-KUBRICK DECISIONS

In *Urie v. Thompson*,<sup>5</sup> the United States Supreme Court considered when a claim accrued under the Federal Employees Liability Act (FELA), which has a three year statute of limitations.<sup>6</sup> Tom Urie, a railroad worker, contracted silicosis during the course of his thirty year employment with the Missouri Pacific Railroad. Urie alleged that the silicosis, a pulmonary disease, resulted from his exposure to silica dust that came into the locomotive cabs from sand the locomotive dropped on the railroad track to increase traction.

There was no evidence Urie should have been aware he had silicosis prior to the time he became ill. The Court referred to Urie's unawareness of his injury as "blameless ignorance"<sup>7</sup> and noted the purpose of a statute of limitations is to "require the assertion of claims within a specified period of time after notice of the invasion of legal rights."<sup>8</sup>

The defendant argued that Urie's claim was time barred because he must have contracted the disease some time long before November 25, 1938. Urie did not file suit until November 25, 1941, so, if the claim accrued before November 25, 1938, it fell outside the FELA three year statute of limitations. Alternatively, the defendant argued that each inhalation of silica dust was a separate tort giving rise to a separate cause of action. Application of this theory restricted recovery to only the incremental injury caused by inhalation of dust since 1938.

Urie argued that the claim did not accrue until he was incapacitated as a result of the disease manifesting itself. The Court rejected the

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<sup>5</sup>337 U.S. 163 (1949).

<sup>6</sup>45 U.S.C. § 56 (1982).

<sup>7</sup>*Urie*, 337 U.S. at 170.

<sup>8</sup>*Id.*

defendant's arguments and accepted *Urie*'s argument, reasoning that the defendant's proposed accrual standard barred or unfairly limited damages and thwarted the congressional purpose of the FELA.<sup>9</sup>

The Court of Appeals for the Fifth Circuit applied the *Urie* standard to a medical malpractice action brought under the FTCA in *Quinton v. United States*.<sup>10</sup> In that case, the plaintiff's wife received a blood transfusion at an Air Force hospital in May 1956. In December 1959, she gave birth to a stillborn child and discovered that the blood she received in 1956 was Rh positive, although her blood type was Rh negative. As a result, she could not have children without their likely being stillborn or suffering from birth defects.

The court rejected the government's argument to dismiss the claim on statute of limitation grounds although more than two years had elapsed from the date of the transfusion before the claim was filed.<sup>11</sup> The court held that the claim could be filed "within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based."<sup>12</sup> The court interpreted *Urie*'s definition of accrual as the point the injury manifests itself, rather than the time the injury was inflicted.<sup>13</sup> The court noted that there was no evidence the plaintiff or his wife knew or could have known of the erroneous transfusion prior to 1959.<sup>14</sup>

*Quinton* was followed by several cases involving plaintiffs who were aware they had been injured but who were unaware their injuries resulted from malpractice.<sup>15</sup> The courts considering the issue held that the statute of limitations did not run until they became aware malpractice was involved in their treatment.<sup>16</sup>

Typical of these cases is *Bridgford v. United States*,<sup>17</sup> in which the Fourth Circuit considered the case of a military retiree's dependent son who had a vein stripping operation at Bethesda Navy Hospital in 1964 to relieve varicose veins in his legs. During the surgery, a doctor erroneously severed a major vein. The doctor identified the mistake during the surgery when blood did not properly drain from

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<sup>9</sup>*Id.* at 169.

<sup>10</sup>304 F.2d 234 (5th Cir. 1962).

<sup>11</sup>*Id.* at 235.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 241 n.12.

<sup>14</sup>*Id.* at 241.

<sup>15</sup>*E.g.*, *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977); *Bridgford v. United States*, 550 F.2d 978 (4th Cir. 1977); *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974).

<sup>16</sup>*See* cases cited *supra* note 15.

<sup>17</sup>550 F.2d 978 (4th Cir. 1977).

the boy's legs. He joined the severed portion of the vein to another vein in order to provide adequate drainage. The doctor told the plaintiff about the mistake after surgery but assured him there would be no problem. When the boy experienced a slow recovery and pain, the doctor told him he was a slow healer, and that there had been nerve damage during surgery. The hospital released the plaintiff but readmitted him when the pain continued. Physicians then told him the pain was due to emotional problems.

Pain and swelling continued unabated until 1969 when a vein in his buttocks became noticeably larger. In 1970, the plaintiff obtained treatment from a private physician who discovered that the severed vein had apparently become blocked shortly after the vein stripping procedure. The new doctor told the plaintiff his condition was now untreatable and that he must wear support stockings. The plaintiff filed an administrative claim, and ultimately filed suit, to recover for the injury.

The court rejected the government's argument that the claim accrued in 1964 when the plaintiff and his mother learned about the erroneously severed vein." At that time, reasoned the court, the plaintiff did not know he had damages in the form of some actual loss.<sup>19</sup> Although he was told of the mistake, he was also told the mistake was corrected and there had been no harm. The mere threat of future harm was not sufficient to support a cause of action, and knowledge of some insignificant damage would not preclude a later action for substantial damage.<sup>20</sup> The court held that "until claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action—duty, breach, causation, damages—his claim against the Government does not accrue."<sup>21</sup>

### III. *KUBRICK*

In *Kubrick v. United States*,<sup>22</sup> the Third Circuit considered the *Bridgford* test and followed the trend toward an expanded definition of the elements that a plaintiff must know to begin the running of the FTCA statute of limitations.

In 1968, Kubrick, a veteran, was treated in a Veterans' Administration hospital for a leg infection by irrigating the infected area with

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<sup>18</sup>*Id.* at 982.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* See also *Marrapese v. Rhode Island*, 749 F.2d 934 (1st Cir. 1984), *cert. denied*, 474 U.S. 921 (1985) for a general discussion of the rule against claim splitting.

<sup>21</sup>550 F.2d at 981-82.

<sup>22</sup>581 F.2d 1092 (3rd Cir. 1978), *reaff'd*, 444 U.S. 111 (1979).

neomycin, an antibiotic. Although the infection cleared up, six weeks after discharge Kubrick noticed some loss of hearing and a ringing sensation in his ears. Doctors diagnosed his condition as bilateral nerve deafness and, in 1969, told him the hearing loss was probably caused by the neomycin treatment at the VA hospital.

Kubrick was already receiving disability benefits for a service-connected back injury. He filed for an increase in benefits, alleging that the neomycin treatment caused his deafness. The Veterans' Administration denied the initial claim and a resubmission. It stated there was no causal connection between the neomycin treatment and Kubrick's hearing loss. The Veterans' Administration also claimed there was no evidence of carelessness, fault, or negligence on the part of the government.

During his administrative appeal, the Veterans' Administration told Kubrick his doctor suggested that his hearing loss could have been caused by his occupation as a machinist. Kubrick questioned his doctor, who denied making the statement. The doctor told him the neomycin caused the hearing loss and that it should not have been administered. The Veterans' Administration ultimately denied Kubrick's appeal and he filed suit under the FTCA.

The district court rejected the government's position that Kubrick's claim was barred by the two-year statute of limitations.<sup>23</sup> The government argued the statute began running in 1969 when Kubrick learned his hearing loss was a result of neomycin treatment. The court of appeals sustained the district court, finding that Kubrick's claim did not accrue until 1971, when Kubrick learned that the neomycin should not have been administered.<sup>24</sup>

The court of appeals noted a special test existed to determine when the claim accrues in situations where a plaintiff has no reason to believe he has been the victim of negligent treatment, even though he knows the treatment caused his injury. "In these situations, if the plaintiff can prove that in the exercise of due diligence he did not know, nor should he have known, facts that would have alerted a reasonable person to the possibility that the treatment was improper, then the limitation period is tolled."<sup>25</sup> The court reasoned that any other result would fail to accord with the *Urie* and *Quinton* "blameless ignorance" theory and would be inequitable.<sup>26</sup>

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<sup>23</sup>435 F. Supp. 166,179 (E.D. Pa. 1977).

<sup>24</sup>581 F.2d at 1096-97.

<sup>25</sup>*Id.* at 1097.

<sup>26</sup>*Id.*

The Supreme Court reversed.<sup>27</sup> The Court first listed the purpose of statutes of limitation in general<sup>28</sup> and then stressed that § 2401 (b) represented Congress' decision on the role of limitations in barring tort claims against the government.<sup>29</sup> It emphasized that Congress' intent should be neither extended nor narrowed.<sup>30</sup>

The Court noted that in 1969 Kubrick knew that he had been injured and the cause of his injury. The Court stated that the lower courts' decisions that the limitations period did not run until Kubrick discovered, in 1971, that the neomycin treatment was malpractice, were not supported by the language of the FTCA, its legislative history, or case law at the time of its passage.<sup>31</sup> The Court held that the final element, knowledge of negligence, was not necessary to begin the running of the statute.<sup>32</sup>

In a footnote, the Court distinguished *Uriev. Thompson*<sup>33</sup> and *Quinton v. United States*<sup>34</sup> as cases involving delayed manifestation of an injury.<sup>35</sup> These plaintiffs' situations differed from Kubrick's situation. Kubrick knew that he had been injured, and the cause, but he did not know that his injury resulted from the violation of a legal duty. The Court rejected *Bridgford* and the cases relied on by the circuit court as cases requiring knowledge of malpractice before accrual of the claim. It said these cases misinterpreted *Urie* and *Quinton* and were a recent departure from the general rule.<sup>36</sup>

The Court stated that it was "unconvinced that for statute of limitations purposes a plaintiffs ignorance of his legal rights and his ignorance of the fact of his injury or its causes should receive identical treatment."<sup>37</sup> The Court reasoned that a plaintiff may not know he has been injured until the injury manifests itself.<sup>38</sup> Alternatively, the

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<sup>27</sup>United States v. Kubrick, 444 U.S. 111 (1979).

<sup>28</sup>The Court stated that statutes of limitations are found in most systems of jurisprudence and that they represent the point at which legislatures have determined the right to present a claim is outweighed by the right to be free from stale claims. Plaintiffs are given a reasonable time to present their claims before the statute has run. Afterward, courts and defendants are shielded from cases where evidence may have been lost because of fading memories and the loss of documents and witnesses. *Id.* at 117.

<sup>29</sup>Congress determined two years was the appropriate balance between plaintiffs' interests in presenting their claims and governments' interests in being free from them. The statute of limitations serves a valid public purpose. *Id.*

<sup>30</sup>*Id.* at 117-18.

<sup>31</sup>*Id.* at 118-19.

<sup>32</sup>*Id.* at 122-24.

<sup>33</sup>337 U.S. 163 (1949).

<sup>34</sup>304 F.2d 234 (5th Cir. 1962).

<sup>35</sup>*Kubrick*, 444 U.S. at 120 n.7.

<sup>36</sup>*Id.* at 121 n.8.

<sup>37</sup>*Id.* at 122.

<sup>38</sup>*Id.*

facts about the cause of the injury may be in the defendant's control, impossible for the plaintiff to obtain. Once a plaintiff knows he has been injured and by whom, he is no longer at the defendant's mercy.<sup>39</sup>

The plaintiff may consult other individuals who can tell him if his legal rights have been violated, and he has a duty to do so.<sup>40</sup> In Kubrick's situation, he only needed to ask other doctors if the neomycin treatment was appropriate to discover that he suffered from an actionable wrong. While Kubrick sought expert advice on the cause of his injury, the neomycin treatment, he did not ask if this treatment was improper. According to the Court, Congress did not intend that a claim should not accrue until the plaintiff knew his injury was negligently inflicted.<sup>41</sup> The Court reasoned that failure to require a reasonably diligent effort to present a tort claim against the government undermined the purpose of the limitations statute.<sup>42</sup>

The Court also noted that, even if a plaintiff seeks advice, he could be incompetently or mistakenly advised that his injury did not support a suit against the individual who inflicted the injury.<sup>43</sup> Alternatively, he could encounter a situation in which experts differed as to whether the defendant's conduct was negligent. In either case, the plaintiff must make the same decision other plaintiffs must make, whether or not to sue. The Court determined there was no reason to subject the defendant to potential stale claims because the plaintiff discovered he had a cause of action outside the two-year limitations period.<sup>44</sup>

The lower courts also felt Kubrick's delay should be excused because of the complexity of the negligence issue in this case.<sup>45</sup> The Supreme Court rejected this contention, noting that negligence issues are frequently complicated.<sup>46</sup> Further, it stated that if statutes of limitation did not run until plaintiffs who failed to seek advice on the validity of their negligence claims realized they had been negligently injured, the same provision must be made available to other injured plaintiffs with other tort claims under the FTCA or claims under other federal statutes.<sup>47</sup>

The Court noted that, although statutes of limitations make otherwise valid claims unenforceable, courts must enforce these statutes

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<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 123.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 124.

<sup>44</sup>*Id.*

<sup>45</sup>435 F. Supp. at 185; 581 F.2d at 1097.

<sup>46</sup>444 U.S. at 124.

<sup>47</sup>*Id.*

in accordance with Congress' intent in establishing them.<sup>48</sup> If Congress was not satisfied with the result in the case, it could amend the FTCA.<sup>49</sup>

Writing in dissent, Justice Stevens noted that the *Urie* blameless ignorance standard precluded the Court from distinguishing between a plaintiff's knowledge of the cause of an injury and knowledge of the doctor's negligence.<sup>50</sup> He said that, in both instances, the typical plaintiff accepted his doctor's explanation of the situation. Even if the plaintiff did not, there is no assurance another doctor will inform the plaintiff that his doctor was negligent. In Kubrick's situation, the government not only denied that the health care was negligent, but it may have misrepresented the cause of the injury to Kubrick."

The dissent also noted that, under the *Urie* rule, the statute of limitations ran if a reasonably diligent person, with knowledge of an injury or its cause, was on notice of a doctor's misconduct.<sup>52</sup> There was no need to distinguish unawareness of negligence from unawareness of an injury or of its cause. Justice Stevens argued that the district court found Kubrick's belief that there was no malpractice reasonable and the Supreme Court should not substitute its judgment for that decision.<sup>53</sup>

Case comment writers generally felt *Kubrick's* effect would be to deprive malpractice victims of an opportunity to recover under the FTCA.<sup>54</sup>

#### IV. SCOPE OF *KUBRICK*

*Kubrick* is a medical malpractice case. The Court noted that medical malpractice cases required discovery by the plaintiff of both an injury and its cause before a cause of action accrues.<sup>55</sup> Although the Court deleted the lower courts' requirement that a plaintiff be aware the injury was caused by negligence, it left the medical malpractice accrual standard a more plaintiff-oriented standard than the normal tort accrual standard, under which accrual occurs at the time of the plaintiff's injury.<sup>56</sup>

"*Id.* at 125.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 127. Justice Brennan and Justice Marshall joined Justice Stevens's dissent.

<sup>51</sup>*Id.* at 128.

<sup>52</sup>*Id.* at 127.

<sup>53</sup>*Id.* at 128.

<sup>54</sup>See, e.g., Comment, *Federal Tort Claims Act—Accrual of Medical Malpractice Action—United States v. Kubrick*, 4 W. New Eng. L. Rev. 155, 168–70 (1981).

<sup>55</sup>444 U.S. at 120.

<sup>56</sup>*Id.*

The Federal Tort Claims Act does not establish a separate accrual standard for medical malpractice claims. It simply requires that a claim must be filed within “two years after such a claim accrues.”<sup>57</sup> *Kubrick* traced the evolution of the special malpractice rule and determined this exception was a judicial creation.<sup>58</sup> The Court did not indicate whether the more liberal standard used in medical malpractice cases was restricted to those cases. Thus lower courts were left to wrestle with the issue of the scope of the *Kubrick* accrual standard. Courts arrived at various results when they considered whether *Kubrick*’s accrual standards are restricted to medical malpractice settings.

### A. KUBRICK AS A CLARIFICATION OF THE DISCOVERY RULE

The discovery doctrine protects blameless ignorance.<sup>59</sup> This doctrine did not develop in a malpractice case, but rather in *Urie*, a delayed manifestation of injury FELA case. There, the plaintiff faced the prospect of losing his cause of action before he could pursue it. To give plaintiffs an opportunity to present their claims for adjudication, the Court extended accrual of the claim from the time the injury was inflicted until it was manifested.<sup>60</sup> At this point, plaintiffs’ failure to pursue the claim could be held against them.

*Urie* used broad language when it stated that the claim accrued when the plaintiff had “notice of the invasion of [his] legal rights.”<sup>61</sup> It did not restrict the doctrine to the FELA, the statute under which the case arose. Rather, the Court attempted to discern the congressional purpose of the statute and how to balance this purpose with the need for a statute of limitations. The Court’s focus was on the “humane legislative plan” Congress intended, and how to avoid thwarting the congressional purpose.<sup>62</sup>

*Quinton* brought the *Urie* discovery rule to FTCA medical malpractice actions, but it did so with broad language that delayed accrual until the plaintiff “discovered, or in the exercise of reasonable diligence should have discovered, the acts of malpractice upon which his claim is based.”<sup>63</sup> *Quinton*’s focus, as was *Urie*’s, was on not depriving a plaintiff of the opportunity to litigate his claim.

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<sup>57</sup> 28 U.S.C. § 2401(b) (1982); see *Kubrick*, 444 U.S. at 120 n.6

<sup>58</sup> 444 U.S. at 120 n.7.

<sup>59</sup> *Stoleson v. United States*, 629 F.2d 1265, 1269 (7th Cir. 1980)

<sup>60</sup> *Urie*, 337 U.S. at 170.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 169–70.

<sup>63</sup> “*Quinton*, 304 F.2d at 235.



*Kubrick*, like *Quinton*, arose in a medical malpractice setting. Nevertheless, the Court looked to *Urie*, an FELA case, for the doctrine it was interpreting. The Court again focused on congressional intent, but this time the congressional intent related to a cutoff of the government's vulnerability to suit.<sup>64</sup> The Court recognized that its *Urie* discovery rule had been expanded beyond Congress' intent. It said Congress did not intend to require that a plaintiff be aware of more than the fact of his injury and its cause for a claim to accrue.<sup>65</sup> The Court balanced its concern for allowing plaintiffs to pursue causes of action against the government with the government's need to cut off claims at some point. The accrual standard was not knowledge of the legal consequences of an injury, but merely knowledge that an injury occurred and what caused it.<sup>66</sup> Armed with this knowledge a plaintiff must determine whether he has a valid claim.

### ***B. EXTENSION OF THE KUBRICK STANDARD BEYOND MEDICAL MALPRACTICE CASES***

One of the broadest statements of *Kubrick's* applicability is the Fifth Circuit case, *Dubose v. Kansas City Southern Railway Co.*<sup>67</sup> The court there faced a situation similar to the one the Supreme Court faced in *Urie*. The plaintiff was the widow of a railroad car repairman. She alleged that her husband was exposed to various irritants in the course of his work. These irritants created breathing problems and ultimately resulted in his death from lung cancer. The plaintiff's husband did not realize that his breathing problems were job-related until the cancer was diagnosed.

The railroad argued the claim accrued early enough to be barred by the FELA's three-year statute of limitations. Its position was that *Kubrick* should be restricted to medical malpractice cases under the FTCA and *Urie* to occupational disease cases under the FELA. The court rejected this reasoning and said *Kubrick* was merely the Supreme Court's "latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause."<sup>68</sup> *Kubrick*, the court determined, was a restatement of the *Urie* discovery rule and definition of its outer limits rather than

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<sup>64</sup> 444 U.S. at 111-20.

<sup>65</sup> *Id.* at 118-20.

<sup>66</sup> *Id.* at 122-24.

<sup>67</sup> 729 F.2d 1026 (5th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984). For further discussion of *Dubose*, see *infra* text accompanying notes 137-39.

<sup>68</sup> 729 F.2d at 1030.

a new test that merely applied in medical malpractice actions.<sup>69</sup> The court held the correct standard to apply was when Dubose should have known his health problems were job-related, rather than the old *Urie* standard of when the injury manifested itself.<sup>70</sup> Thus, the court used *Kubrick* to require knowledge of causation, rather than just knowledge of injury, before a claim accrued.

Similarly, the Seventh Circuit broadly construed *Kubrick* in *Stoleson v. United States*.<sup>71</sup> The court stated that there was no basis to exempt only medical malpractice plaintiffs from the harsh application of statutes of limitation.<sup>72</sup> The fact situation in *Stoleson* was similar to the one in *Urie*. In both cases, the plaintiffs experienced ill health, and accrual of their claims was deferred until they knew their working conditions caused their problems. The court determined the focus should be on the nature of the problems the plaintiff encountered in recognizing the injury and its cause, rather than whether the defendant is a doctor. “[A]ny plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule.”<sup>73</sup>

*Dubose* and *Stoleson* logically analyze *Kubrick* as an accrual standard for general application rather than merely a malpractice standard. Congress did not establish separate accrual standards for different tort actions in §2401 (b). Rather, the Court developed the *Kubrick* accrual standard as it tried to balance Congress’ purpose in enacting the FTCA with the claim cutoff provision found in §2401 (b).

*Dubose* recognized the Supreme Court was merely fine tuning its discovery rule with the *Kubrick* decision, rather than creating a separate new standard for FTCA medical malpractice actions. *Dubose* and the other decisions that expanded *Kubrick* first examined the facts of the case to determine if it was a type of case in which the plaintiff could not know either that he had been injured, or the cause of his injury.<sup>74</sup> If so, *Kubrick* was applied rather than the general tort rule that a claim accrues when the injury is inflicted. The analysis then proceeded using the *Kubrick* standard to determine if the plaintiff brought his claim in a timely manner.

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<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 1031–32.

<sup>71</sup>629 F.2d 1265 (7th Cir. 1980). For a more detailed discussion of *Stoleson*, see *infra* text accompanying notes 121–23.

<sup>72</sup>629 F.2d at 1269.

<sup>73</sup>*Id.*

<sup>74</sup>See *supra* notes 67–72 and accompanying text; see also *Liuzzo v. United States*, 485 F. Supp. 1274, 1281–84 (E. D. Mich. 1980).

This approach seems more reasonable than the approach proposed by the Court of Appeals for the Eighth Circuit in *Brazzell v. United States*.<sup>75</sup> In *Brazzell*, the court applied *Kubrick's* accrual standard to a swine flu vaccination case. The court reasoned that, although the case involved a products liability claim, the issues, as in most medical malpractice claims, were the subject of conflicting medical opinions as to the cause of the plaintiffs injury. As a result, the usual rule that a claim accrues at the time of injury did not apply.<sup>76</sup>

Just as the *Stoleson* court noted defendants' occupations should not control when a claim accrues, the presence of conflicting medical opinions should not determine which accrual standard is applied. Conflicting opinions occur in many situations. For example, conflicting testimony from engineers or chemists could occur in other cases. The plaintiff has the responsibility to resolve conflicts and decide to file a claim within the limitations period.

### **C. RESTRICTION OF THE KUBRICK STANDARD TO MEDICAL MALPRACTICE CASES**

The broad application of the standard by the *Dubose* and *Stoleson* courts must be contrasted with that of the courts that have restricted *Kubrick* to medical malpractice cases. The Fourth Circuit rejected an extension of *Kubrick* beyond the medical malpractice area in *Wilkinson v. United States*.<sup>77</sup> There, a car driven by a sailor on temporary duty struck the plaintiff, a pedestrian. The plaintiff sued the sailor. The United States removed the case to federal district court because the sailor was driving the car within the scope of his employment. The court substituted the United States as the party defendant under the Driver's Act<sup>78</sup> and then dismissed the case as time-barred. The plaintiff argued that the untimely filing of an administrative claim

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<sup>75</sup>788 F.2d 1352, *order on petition for rehearing*, 788 F.2d 1361 (8th Cir. 1986). On a petition for rehearing, the court vacated its judgment and remanded the case to the district court for reconsideration and adjudication of plaintiff's alternative grounds for relief. The opinion is representative of one approach that may be taken to expand *Kubrick's* scope beyond medical malpractice cases. For the facts of *Brazzell*, see *infra* text accompanying notes 124-27.

<sup>76</sup>788 F.2d at 1356-57.

<sup>77</sup>677 F.2d 998 (4th Cir.), *cert. denied*, 459 U.S. 906 (1982). For additional facts and a discussion of *Wilkinson*, see *infra* text accompanying notes 160-62.

<sup>78</sup>The Federal Driver's Act, 28 U.S.C. § 2679 (1982), provides federal employees driving vehicles within the scope of their employment with immunity from personal liability. An injured party must instead file a claim against the United States under the Federal Tort Claims Act. If the employee is sued, the United States is substituted as the defendant.

should be excused because he did not know the sailor was acting within the scope of his employment.<sup>79</sup>

The plaintiff did not raise the *Kubrick* accrual standard, but Judge Butzner, who dissented, did.<sup>80</sup> He opined that *Kubrick* tolled the statute of limitations until the plaintiff knew his injury was caused by a government employee acting within the scope of his employment.<sup>81</sup> He reasoned that *Kubrick's* requirement of knowledge of who caused the injury was composed of both the name of a potential defendant and also his status as a government employee acting within the scope of his employment.<sup>82</sup>

The majority determined this argument was unpersuasive, and distinguished *Kubrick* as a case involving medical malpractice.<sup>83</sup> The court noted that in medical malpractice cases a patient may not know at the time of injury that he has been injured or that he has a cause of action against the doctor. The court reasoned that, even if *Kubrick* applied, the plaintiff knew he was injured and who injured him at the time of the accident. As a result, there was no need to defer accrual of the claim and the *Kubrick* test was inapplicable.<sup>84</sup> Although the court did not say it would restrict *Kubrick* to medical malpractice cases alone, it referred to *Kubrick* as a medical malpractice case. It also commented that medical malpractice plaintiffs may lack information regarding injury and causation. This indicates that the court regards *Kubrick* as having more restricted application than that expressed by the *Dubose* and *Stoleson* courts.

The Court of Appeals for the Eighth Circuit has commented on *Kubrick's* scope several times. In *Snyder v. United States*,<sup>85</sup> a medical malpractice case, the court cited *Kubrick* for the proposition that medical malpractice cases are the exception to the general FTCA rule that a claim accrues at the time of a plaintiff's injury.<sup>86</sup> The court did not elaborate on why *Kubrick* should be restricted to medical malpractice only.

Likewise, in *Wollman v. Gross*,<sup>87</sup> the court noted, but did not discuss, why the *Kubrick* standard was restricted to medical malpractice

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<sup>79</sup>677 F.2d at 998–99.

<sup>80</sup>*Id.* at 1001–06.

<sup>81</sup>*Id.* at 1003–06.

<sup>82</sup>*Id.* at 1005.

<sup>83</sup>*Id.* at 1001–02.

<sup>84</sup>*Id.*

<sup>85</sup>717 F.2d 1193 (8th Cir. 1983). For the facts of *Snyder*, see *infra* text accompanying notes 252–54.

<sup>86</sup>717 F.2d at 1195.

<sup>87</sup>637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981); see also *infra* text accompanying notes 155–59.

cases. It simply reviewed the standard and noted *Kubrick's* primary application had been in medical malpractice cases.<sup>88</sup> In *Wollman*, the court considered a claim from the plaintiff that his FTCA action should not be time-barred because of his "blameless ignorance" of the fact that the driver of the car who injured him was acting within the scope of his employment. The plaintiff argued that he should have the benefit of the *Kubrick* delayed accrual standard. The court declined to determine whether *Kubrick's* "blameless ignorance" doctrine extended beyond the medical malpractice area.<sup>89</sup> The court stated that, even if it did, this plaintiff would not benefit from the extension because the claim was also late under the *Kubrick* standard.<sup>90</sup>

Although the courts in both *Wilkinson* and *Wollman* treated *Kubrick* as applicable only to medical malpractice cases, both courts applied the standard and determined the outcome of the case was unchanged. It is difficult to determine whether the courts were searching for a fact situation in which to expand *Kubrick* or whether they were simply attempting to demonstrate why the *Kubrick* standard should be restricted to medical malpractice cases. The courts' failure to provide analyses for their limited application of the *Kubrick* standard stands in sharp contrast to those provided by the *Dubose* and *Stoleson* courts.

The situations considered in *Wilkinson* and *Wollman* both involved plaintiffs who, like *Kubrick*, failed to appreciate the legal significance of facts they either knew or could have known if they inquired. *Kubrick* only had to ask his doctor or lawyer whether his treatment was negligent. The *Wilkinson* and *Wollman* plaintiffs only had to ask their lawyers if the United States employee status of the other drivers affected their cases. The plaintiffs did not exercise the reasonable effort required by *Kubrick* to discover all of the legal implications of the factual causes of their injuries. Thus, these plaintiffs' ignorance was not blameless.<sup>91</sup> The courts, therefore, reasoned that even application of *Kubrick* did not extend the time of accrual of the claims. This reasoning only explained why the *Kubrick* standard would not be beneficial to the plaintiffs considered. It did not, however, explain or justify a restriction of *Kubrick* to medical malpractice cases.

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<sup>88</sup>637 F.2d at 548.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 549.

<sup>91</sup>"We also have some question as to whether *Wollman* was in fact 'blamelessly ignorant'." *Id.* at 549 n.6.

### ***D. APPLICATION OF KUBRICK TO CONTINUING TORT CASES***

In *Gross v. United States*,<sup>92</sup> an FTCA action for continuous intentional infliction of emotional distress, the Eighth Circuit refused to apply *Kubrick* when it would have *shortened* the limitations period in continuing tort cases. The court rejected the government's assertion that a continuing tort claim accrued when the plaintiff first knew or should have known of his injury and its cause.<sup>93</sup> In *Gross*, a farmer alleged the Agricultural Stabilization and Conservation Service Committee wrongfully denied him the opportunity to participate in a feed grain program for several years with knowledge its actions would cause him emotional distress.

The court stated the alleged tortious conduct was of a continuous nature and that, as a result, the claim did not accrue for statute of limitations purposes until the last tortious act.<sup>94</sup> The court stated that *Kubrick* did not apply to continuing tort situations, and that *Kubrich* was a medical malpractice case rather than a continuing tort case.<sup>95</sup>

Even in the medical malpractice area, continuing torts may present fact situations in which strict application of the *Kubrick* standard would result in an unfair denial of a claim as untimely. The Court of Appeals for the District of Columbia considered such a situation in *Page v. United States*.<sup>96</sup>

In *Page*, the court reviewed a veteran's claim that, over a nineteen-year period, the Veterans' Administration prescribed quantities and combinations of drugs that resulted in his addiction and other injuries without properly supervising his condition. The plaintiff, Darrell Page, alleged he received routine delivery of drugs through the mail from the Veterans' Administration for years.

The court rejected the government's claim that, under the *Kubrich* standard, a similar action, ten years prior to the one the court considered, began the running of the statute of limitations.<sup>97</sup> The court noted the questionable conduct continued within the two-year period prior to the current action, and therefore the claim was not barred.

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<sup>92</sup>676 F.2d 295 (8th Cir. 1982).

<sup>93</sup>*Id.* at 300.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup>729 F.2d 818 (D.C. Cir. 1984).

<sup>97</sup>*Id.* at 821.

"Just as *res judicata* cannot bar a claim predicated on events that have not yet transpired, knowledge acquired in 1972 that one has a claim could not trigger time limitations on allegedly tortious conduct that had not yet occurred."<sup>98</sup>

The court cited *Gross v. United States*<sup>99</sup> for the proposition the *Kubrick* is inapplicable to continuing torts,<sup>100</sup> and held that the claim accrued when the treatment ended.<sup>101</sup> It did not go so far as to state *Kubrick* is restricted to medical malpractice situations.

The *Kubrick* standard is not appropriate in continuing tort situations because it could, as the *Page* court noted, prevent a plaintiff from bringing a cause of action for a wrongful act or omission by the government that occurred, as part of a continuous course of conduct, more than two years after the conduct started.

There may be other situations in which application of the *Kubrick* standard of accrual will not be appropriate because it will unfairly deprive a plaintiff of a cause of action. These situations, however, could be identified within specific types of cases or on a situation-by-situation basis after analyzing the factors involved in a specific type of action. There should be a logical reason for applying or not applying the *Kubrick* standard, rather than a mere recitation that *Kubrick* was a malpractice case.

The *Kubrick* Court anticipated that its standard would be applied outside the medical malpractice field. When the Court rejected the circuit court's determination that the technical complexity of the case supported deferral of accrual of the claim, it stated it would be difficult not to allow deferral of a claim in any complicated case.<sup>102</sup> Additionally, the Court did not specifically discuss medical malpractice when it remarked that it was "unconvinced that for statute of limitations purposes a plaintiffs ignorance of his legal rights and his ignorance of the fact of his injury or its causes should receive identical treatment."<sup>103</sup>

Congress decided to allow some tort claims against the government and required the presentation of those claims within two years of accrual.<sup>104</sup> Different standards of accrual are needed to ensure all potential claimants have the same opportunity to decide whether or

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<sup>98</sup> *Id.*

<sup>99</sup> 676 F.2d 295 (8th Cir. 1982).

<sup>100</sup> *Id.* at 822 & nn. 31-35; see *supra* text accompanying notes 92-95

<sup>101</sup> 729 F.2d at 822-23.

<sup>102</sup> 444 U.S. at 124.

<sup>103</sup> *Id.* at 122.

<sup>104</sup> See *supra* notes 1 & 3.

not to file a claim.<sup>105</sup> The *Kubrick* standard puts claimants who do not know the cause of their injury at the time it is manifested in the same position as claimants with traditional claims. With the knowledge of the cause of their injury, both sets of plaintiffs must decide whether or not to file a claim.<sup>106</sup> They each have two years, from the time they know their injury and its cause, to make this decision. It is reasonable to conclude that in any situation where a plaintiff cannot reasonably be expected to determine the fact that he has been injured and the cause of his injury, the *Kubrick* standard should apply.<sup>107</sup> It should not be restricted only to medical malpractice cases in which a plaintiff encounters this problem.

## V. DEGREE AND TYPE OF KNOWLEDGE REQUIRED TO TRIGGER ACCRUAL OF THE CLAIM

### A. *BELIEF v. KNOWLEDGE*

In *Kubrick*, the plaintiff clearly knew that he had been injured, and that the medical treatment he received caused his injury. An issue exists as to what degree of certainty about these factors is required to start the running of the statute of limitations. The Fifth Circuit analyzed the issue in *Harrison v. United States*.<sup>108</sup> The plaintiff, Sibyl Harrison, experienced severe headaches. In 1966 she sought treatment for them at a military hospital because her husband was a retired airman. Her doctors suspected a brain tumor and performed procedures to test for this possibility. The tests involved injecting air into the brain and spinal cord, then moving the patient into various positions and taking x-rays to observe the movement of the air bubble. Mrs. Harrison lost consciousness during the test. When she regained consciousness she noted her arm was slightly numb. Her doctors assured her this was normal and other patients told Mrs. Harrison they had experienced this also. The numbness soon disappeared but the headaches did not. Additionally, she experienced a burning sensation and paralysis.

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<sup>105</sup> 444 U.S. at 123–24.

<sup>106</sup> *Id.* at 124.

<sup>107</sup> [A]ny plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule. Many malpractice plaintiffs face serious problems in discovering these critical facts. But as *Urie* demonstrates, the rule was not created in a medical malpractice context and is not limited to such cases.

*Stoleson v. United States*, 629 F.2d 1265, 1269 (7th Cir. 1980).

<sup>108</sup> 708 F.2d 1023 (5th Cir. 1983).



While they conducted the test the doctors allowed the needle they used to inject the air to be pushed into the center of Mrs. Harrison's brain. Although the doctors noted the problem on Mrs. Harrison's records, and the x-rays they took showed the problem, they failed to tell Mrs. Harrison. She left the hospital and continued to seek treatment for her problem. She consulted several different doctors, all in vain. Finally, she discovered she had a brain tumor and underwent surgery for removal of the tumor.

Prior to the operation, Mrs. Harrison's new doctor requested the x-rays and test results from the military hospital. The doctors there did not send the x-rays and did not report the needle incident when they summarized the test results.<sup>109</sup> After the operation, Mrs. Harrison's pain stopped for a short while but returned. At this time Mrs. Harrison decided the original doctors at the military hospital damaged her brain. She told her attorney this but he was unable to obtain confirmation of her allegations from any of the doctors she consulted.

Mrs. Harrison's attorney attempted to obtain her records but was unable to do so for two and one half years. When she finally saw her records, Mrs. Harrison learned about the needle that damaged her thalamus and caused her pain. Armed with this knowledge, Mrs. Harrison filed a claim and ultimately brought suit.

Faced with the district court's dismissal of Mrs. Harrison's action as untimely, the Fifth Circuit evaluated the degree of awareness that must be present to start the running of the statute of limitations. It distinguished between knowledge, which triggers the statute of limitations, and belief, which does not.<sup>110</sup> The court reasoned that knowledge required a person to believe that a fact is true and that that belief be reasonably based. A belief, without a factual basis for the belief, even if correct, will not start the running of the statute.

The court determined Mrs. Harrison only believed her condition was caused by her medical treatment. She could not know the cause of her condition until she obtained her records, the factual predicate to provide a reasonable basis for her knowledge. The court then analogized Mrs. Harrison's situation to the one Justice White mentioned in *Kubrick*, in which "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."'''

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<sup>109</sup>This action could be considered fraudulent concealment. Fraudulent concealment by the government of its part in causing a tort prevents accrual of a claim. *See infra* notes 289–302 and accompanying text.

'''708 F.2d at 1027.

<sup>111</sup>*Id.* at 1028 (quoting *Kubrick*, 444 U.S. at 1221.

When Mrs. Harrison sought advice, she was able to present only her unsubstantiated belief that she had been injured by government-provided health care. She was unable to identify anything that would allow other doctors to advise her whether her military doctors violated a standard of care when they allegedly injured her.

The *Harrison* standard established that this limited amount of information is insufficient to enable a doctor to competently advise the plaintiff as to whether he now has cause of action.<sup>112</sup> Not enough specific information about the care is available to permit a determination whether a standard of care was violated, or even if the government caused the injury. A doctor needs a more complete set of facts before he can offer an opinion on a case. This set of facts must include the acts that caused the injury. In *Harrison*, the facts had to include information that the needle penetrated Mrs. Harrison's brain.

The District Court for the District of Utah also evaluated the degree of knowledge required to cause a claim to accrue in *Allen v. United States*,<sup>113</sup> in the context of an action by a group of individuals suffering from cancer and leukemia allegedly caused by atomic testing by the Atomic Energy Commission prior to 1953. The court determined *Kubrick* provided the correct standard in such a case, where the injury manifested itself only after a substantial delay. It stated that, in a case where there are many complex scientific issues, there is a problem distinguishing between knowledge of the cause of harm and mere suspicion. The court said suspicion is tied to uncertainty, while knowledge implies certainty.<sup>114</sup> "[O]ne suspects what one can not prove, a more intuitive than demonstrative exercise."<sup>115</sup>

The court reasoned that, in a complex case, common sense requires reasonable knowledge of a cause of injury rather than mere suspicion, no matter how well-founded suspicion seems in retrospect.<sup>116</sup> "Knowledge requires at least a modest factual basis, one to which the perceptive minds of others may be pointed."<sup>117</sup>

Under the *Harrison* and *Allen* approaches, a claim will accrue if the plaintiff is aware of a fact that could objectively be said to establish government cause of an injury. In *Harrison*, Mrs. Harrison was correct that the government caused her injury, but, partly due to government

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<sup>112</sup>If there is a standard of care, and if it has been violated, it is likely a competent doctor will tell the plaintiff of the violation if the plaintiff asks. *Kubrick*, 444 U.S. at 122.

<sup>113</sup>558 F. Supp. 247 (D. Utah 1984).

<sup>114</sup>*Id.* at 344.

<sup>115</sup>*Id.* at 344–45.

<sup>116</sup>*Id.* at 345.

<sup>117</sup>*Id.*

misconduct, she was simply unable to provide any facts to support this belief. Nor were any facts available that would have caused a reasonable person to suspect that the government caused her problems. There did not appear to be any cause for her pain.

Application of the *Harrison* and *Allen* accrual standard should not protect a plaintiff who did not attempt to discover the cause of an injury. For example, if Mrs. Harrison had not attempted to get her treatment records or to obtain details of the treatment when she suspected the government caused her pain, she could have remained ignorant of the cause of her injury. The point of *Kubrick*, however, was that only *blameless* ignorance should be protected. If Mrs. Harrison should have requested her records but did not, her ignorance would not be blameless.

*Kubrick's* goal is to encourage prompt presentation of claims. To prevent the plaintiff from being unfairly deprived of the opportunity to present the claim, *Kubrick* defined an accrual standard of knowledge of injury and its cause. A plaintiff who is aware of these facts must investigate a potential claim must do so or lose the opportunity to present the claim. This situation should be contrasted with one in which a plaintiff is investigating a claim, but has no factual basis for the suspicion that motivated the inquiry, as in *Harrison*. This plaintiff needs protection when the cause of the injury is unknown or unknowable, because the defendant controls relevant facts or because medical science does not recognize the casual connection.

If facts that establish the cause of an injury are reasonably available, then the plaintiff should be charged with knowledge of those reasonably available facts.<sup>118</sup> Thus, a claim could accrue before the plaintiff knew the injury and its cause if a reasonable investigation would discover the information. Certainly it is reasonable to expect the plaintiff to request and to examine relevant records known to exist. One court described an aspect of the duty of inquiry as the duty "to get out the records and inquire further."<sup>119</sup> The gist of this requirement is to require a plaintiff who conducts an inquiry or investigation to do so in a reasonable manner.

*Kubrick* stated that competent expert advice is available as to whether a cause of action is valid. All the plaintiff must do is obtain that advice.<sup>120</sup> If a plaintiff believes the government caused his injury, the plaintiff should be required to obtain and present facts to an expert

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<sup>118</sup>"Under a regime of notice pleading, a person may file suit and use discovery to bring out essential facts." *Nemmers v. United States*, 795 F.2d 631, 632 (7th Cir. 1986).

<sup>119</sup>*Id.* at 631.

<sup>120</sup>444 U.S. at 123-24.

who can then evaluate the allegation. A reasonable investigation to obtain those facts should be required.

In Mrs. Harrison's case, the cause of the injury was unknowable because the government held the information on causation, and failed to provide the requested records. If, however, the government had provided Mrs. Harrison's records, which contained information on the cause of her injury, she would have been charged with knowledge of what was in them. Moreover, if she had not requested the records, she would still be charged with the knowledge of what was in them, because a reasonable inquiry would include a review of the records, and her claim would have accrued.

### ***B. ABSENCE OF SCIENTIFIC RECOGNITION OF CLAIMANT'S THEORY OF CAUSATION***

Occasionally a plaintiff believes that the harm he experienced was caused by a defendant. He may have some factual basis for that belief but medical science will not support the causal relationship. Will the claim accrue when the plaintiff knows the facts and forms his belief? If so, the plaintiff faces the unhappy prospect of having his claim extinguished by a statute of limitations before he could possibly prevail on the merits.

This issue presented itself in *Stoleson v. United States*.<sup>121</sup> Mrs. Stoleson, the plaintiff, worked in an ammunition plant. She was exposed to nitroglycerin in the munitions and rocket propellants she handled. One weekend in January 1968, she suffered a severe angina attack. She suffered several more weekend attacks before she stopped working in 1971. Mrs. Stoleson suspected a connection between her heart problems and working conditions.

In 1969 she read an article in a union newspaper about the possibility that sudden withdrawal from nitroglycerin caused severe angina. Additionally, an occupational safety inspector told Mrs. Stoleson that he believed her heart problems were caused by nitroglycerin exposure. Mrs. Stoleson's treating physician and the physician at the ammunition plant denied nitroglycerin was a cause of Mrs. Stoleson's problems.

Finally, in 1971, Dr. R.L. Lange, the chief of cardiology at the Medical College of Wisconsin, examined Mrs. Stoleson and concluded that her heart problems were caused by exposure to nitroglycerin.

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<sup>121</sup> 629 F.2d 1265 (7th Cir. 1980).

Dr. Lange studied Mrs. Stoleson's case and the cases of eight other workers at Mrs. Stoleson's plant, and scientifically documented the connection between angina and exposure to nitroglycerin in the work place. Dr. Lange's study became the first published medical identification of the causal relationship Mrs. Stoleson suspected. Although nitroglycerin was known to be harmful, and regulations limited exposure to it, heart problems were not among the known risks.

The court rejected the government's contention that Mrs. Stoleson's claim accrued when she first suspected that her exposure to nitroglycerin caused her angina. "A layman's subjective belief, regardless of its sincerity or ultimate vindication, is patently inadequate to go to the trier of fact."<sup>122</sup> The court noted Kubrick would have been told he had a cause of action had he inquired, but that Mrs. Stoleson was correctly informed she did not have a valid claim. Neither the union newspaper article nor the opinion of the safety examiner, who was not a college graduate, were sufficient to start the running of the statute until medical science accepted the causal theory. Therefore, in a legal sense, although she suspected a connection, she did not have "knowledge" of the cause of her injury, which under *Kubrick* would allow the statute to run.<sup>123</sup>

The court acknowledge that its holding could subject defendants to potential liability for an extensive period of time, but noted this would only happen where, as here, defendants breached some other preexisting duty of care.

*Brazzell v. United States*<sup>124</sup> was also a situation where new medical advances were necessary before the claim could accrue. Mrs. Brazzell, on her doctor's advice, got a swine flu vaccination on November 11, 1976. A few days later she complained to her doctor of aches, fever, and chills. Her condition worsened and she was hospitalized as a result of myalgia, intense muscle pain throughout her body. The doctor noted in her medical records that her condition was a result of the swine flu vaccination. After her release from the hospital, she again consulted her doctor because she still suffered muscle pain. Plaintiff asked him whether the vaccination was responsible for her problem. He had changed his mind at this point and assured her that the vaccination's effects had worn off.

Shortly thereafter, the plaintiff began to suffer emotional stress that increased in severity. She consulted a psychiatrist and was hospitalized from mid-April to late May 1977. Her psychiatrist attributed

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<sup>122</sup>*Id.* at 1270.

<sup>123</sup>*Id.* at 1270-71.

<sup>124</sup>788 F.2d 1352 (8th Cir. 1986); *see supra* note 75.

her problems to the physical stress caused by the myalgia. In 1980 plaintiff consulted an attorney and filed a claim for injuries she alleged were caused by her vaccination. The claim was denied and she filed suit.

The government argued that she should have known the cause of her injuries in 1977. The court rejected this argument and held that the plaintiffs suspicions about the cause of her injury did not cause her claim to *accrue*.<sup>125</sup> She could only be expected to know the cause of her injury when she could have been advised by a doctor that the vaccination was the cause. Her doctor advised her the inoculation did not cause her injury. Thus, further inquiry was useless until her own doctor finally identified the vaccine as the cause of her *myalgia*.<sup>126</sup> He was most familiar with her medical history and therefore most likely to discover the cause of her myalgia. The court relied on evidence developed in the district court that this plaintiff was the only person in the country, at that time, to suffer myalgia as a result of the vaccination.<sup>127</sup>

It is unlikely that any court would hold a plaintiff to knowledge that was unknown within the scientific community. Nor, as these courts explained, does *Kubrick* require such a result. This, however, can be a two-edged sword, because a lack of scientific knowledge may also reduce or eliminate the defendant's liability. The *Kubrick* Court presumed that a standard of care existed within the scientific or medical community relative to some aspect of the government's conduct. Once a plaintiff knew the cause of an injury, he could obtain advice from competent individuals within a field as to whether the defendant had violated the standard of *care*.<sup>128</sup> If, however, medical science had not established a standard of care because there was no known casual link between the conduct and injury, a competent individual in the field would advise the plaintiff that no negligence occurred. *Stoleson* noted that a defendant would not be liable for conduct that inflicted injury if the injurious nature of the conduct was *unknown*.<sup>129</sup> There must be a preexisting duty to act or avoid acting in a manner that is known to be potentially injurious.<sup>130</sup>

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<sup>125</sup> *Id.* at 1357.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* But see *In re Swine Flu Products Liability Litigation*, 764 F.2d 637, 638 (9th Cir. 1985) (swine flu program suspended on 16 December 1976 after published reports of connection between neurological disorders and vaccination).

<sup>128</sup> 444 U.S. at 123-24.

<sup>129</sup> *Stoleson*, 629 F.2d at 1271.

<sup>130</sup> *Id.*

### C. INCONCLUSIVE ADVICE REGARDING CAUSE OF INJURY

A plaintiff may be advised that there is only a possible causal relationship or that there is no causal relationship between an injury and a defendant's conduct. The First Circuit considered this issue in *Fidler v. Eastman Kodak Co.*<sup>131</sup> The plaintiff, Deborah Fidler, brought a product liability action against the defendant for headaches and facial pain she experienced as a result of defendant's Pantopaque x-ray contrast medium. When the plaintiff first consulted her physician about the problem, he could not identify a specific cause of her pain but listed the Pantopaque as a possible cause.

A year later doctors performed more tests and again told the plaintiff that the Pantopaque could be a cause of her pain. None of the doctors could tell her that Pantopaque definitely caused her pain. They told her many people had the substance remain in their systems with no harmful effects. She consulted several attorneys, all of whom told her she did not have a valid claim unless she found a doctor who positively attributed her head pain to Pantopaque. Plaintiff consulted several more doctors over the next two years. She then brought her action and at that point found a physician who established that Pantopaque caused her injuries. The action was dismissed as untimely under the Massachusetts product liability statute of limitations.

Plaintiff argued that her doctor's first statements of possible causation were speculation and therefore insufficient to start the running of the statute. She also argued medical knowledge had not progressed enough to make it possible for her to identify the cause of her injury. The court cited *Kubrick* for the proposition that notice of a cause of injury places a plaintiff in the position to investigate and determine if a cause of action exists.<sup>132</sup>

The court said the doctor's statement was not a neutral statement and that "[i]t was enough to lift the issue of causation out of the realm of the 'inherently unknowable' wrong."<sup>133</sup> The court also accepted the reasoning that, if medical or scientific knowledge do not exist to support evidence of causation, the statute of limitations will not run because no cause of action exists.<sup>134</sup> This did not help the plaintiff, because medical evidence existed that identified the connection be-

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<sup>131</sup> 714 F.2d 192 (1st Cir. 1983). Although this is not an FTCA case, but rather a Massachusetts product liability action, the statute of limitations issues are analogous to FTCA statute of limitations issues.

<sup>132</sup> *Id.* at 199–200.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 200.

tween the plaintiffs type of injury and Pantopaque years before she filed her claim.

*Fidler* stands for the proposition that, if the cause of an injury is knowable, and the plaintiff is alerted to the possibility the cause exists, the claim accrues regardless of the advice the plaintiff receives. Like *Kubrick*, *Fidler* presented the situation of a causal link between administration of a substance for treatment, here Pantopaque x-ray contrast medium, and injury, here headaches and facial pain. Although the causal link was apparently difficult to establish in the plaintiffs case, the court distinguished it from a completely unknown causal relationship.<sup>135</sup>

The *Kubrick* opinion noted that the experts were divided on the issue of negligence in that case. Mere differences of opinion among experts, however, will not delay accrual, whether they relate to causation or negligence. There is no more reason to inflict the consequences of erroneous advice about the cause of injury upon the defendant than to inflict the consequences of erroneous advice about the issue of negligence.<sup>136</sup>

The Fifth Circuit case, *Dubose v. Kansas City Southern Railway Co.*,<sup>137</sup> also involved the degree of knowledge required to trigger the running of the statute of limitations. The court stated *Kubrick* should be flexibly applied to give effect to the rationale for the discovery rule.<sup>138</sup> It listed a variety of factors that must be considered before the plaintiff will be charged with notice of the cause of his injury. These factors include "how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiffs suspicion regarding what caused his injury."<sup>139</sup>

Application of the *Dubose* factors to the *Fidler* case could have lead to a different result. The court could have examined the facts and seen that Mrs. Fidler consulted several doctors who advised her of different possible causes of the pain. As a result, the court would probably have given her more time to identify the cause of her injury before imputing knowledge sufficient to begin the running of the statute of limitations.

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<sup>135</sup>The plaintiff consulted several doctors and underwent tests before finding a doctor who correctly identified the causal link. *Id.* at 194–95.

<sup>136</sup>If a plaintiff is erroneously advised that he does not have a case, there is no reason to subject the defendant to the consequences of the error by deferring accrual until the plaintiff realizes he does have a valid cause of action. *Kubrick*, 444 U.S. at 124.

<sup>137</sup>729 F.2d 1026 (5th Cir.), cert. denied, 469 U.S. 854 (1984). For the facts of *Dubose*, see *supra* text accompanying notes 67–70.

<sup>138</sup>729 F.2d at 1031.

<sup>139</sup>*Id.*



The *Dubose* factors appear to ignore the *Kubrick* Court's admonition that negligent or erroneous advice about the validity of the claim will not defer accrual of the claim.<sup>140</sup> Although the Court did not direct this language toward the issue of causation but, rather, toward breach of a legal duty or violation of a standard of care, the result should be the same. A duty of inquiry should be created regarding each of the causes the plaintiff "knew" after being told of them. Certainly, in some remote sense, the number of causes listed could become important in determining when the plaintiff knew of a certain cause, but that circumstance should be rare. For example, if an expert mentioned five causes, then the plaintiff should have "knowledge", in the sense of creating a duty of inquiry as to those five causes. Each must be investigated. On the other hand, if 500 causes were listed, the actual cause or causes would not yet be lifted from the "realm of the inherently unknowable."<sup>141</sup>

### ***D. TYPE OF KNOWLEDGE REQUIRED FOR CLAIM ACCRUAL***

In *Druzun v. United States*,<sup>142</sup> the Seventh Circuit examined the type of knowledge required to start the running of a statute of limitations. A Veterans' Administration hospital treated Mr. Drazan, the plaintiffs husband, for tuberculosis. Mr. Drazan received annual chest x-rays as part of the treatment. One of the x-rays appeared to show a small tumor in one of his lungs and the report regarding the x-ray advised that Drazan be re-examined. No follow-up exam was conducted and the next annual x-ray showed a large cancerous tumor. The cancer killed Drazan the next month.

Later in that year, Mrs. Drazan requested her husband's medical records and discovered the earlier x-ray and recommendation for a follow-up examination. The court held that her claim may have accrued when she received the records rather than when her husband died.<sup>143</sup> It reasoned that the cancer may have killed him because the government negligently failed to follow up on the earlier x-ray.<sup>144</sup> The limitations period on her claim against the government ran only from the point she had reason to suspect the government as a cause of her husband's death.

Absolute certainty of the government cause was not required. The court said that the statute of limitations "begins to run either when

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<sup>140</sup> 444 U.S. at 124.

<sup>141</sup> *Fidler*, 714 F.2d at 200.

<sup>142</sup> 762 F.2d 56 (7th Cir. 1985).

<sup>143</sup> *Id.* at 58-59.

<sup>144</sup> *Id.*

the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstance, of which he might be aware, would have discovered the cause—whichever comes first.”<sup>145</sup> Thus, a reason merely to suspect government causation satisfies the *Kubrick* requirement of knowledge of the cause of injury.

The court declined to start the accrual of the claim at the point of the injury or death of someone in a VA hospital unless there was some notice of government cause of the injury. The court stated that accrual at the time of injury, without a specific reason to suspect government cause, would have the “rather ghoulish consequence” of requiring the injured person or his survivors to request immediately his hospital records to determine if diagnosis or treatment caused the injury.<sup>146</sup>

The *Drazan* standard of “suspicious circumstances” requires some factual basis as a trigger for accrual of the claim. The court provided an example of a suspicious circumstance.<sup>147</sup> It suggested that Mr. Drazan could have remarked to his doctor that he was surprised to learn that his cancer had grown so much before being discovered, since he was receiving annual x-rays. The doctor could have responded that something must have been missed in an earlier x-ray. The court opined that if this scenario occurred, Mrs. Drazan might have had a reason to believe the government was a cause of her husband's death at the time of his death.

The example given was not a good one because it provided notice of both potential causation and potential negligence. That is, if someone noticed the problem on an earlier x-ray, the cancer could have been detected and possibly treated. The example is one that the *Kubrick* dissent anticipated, in which the cause of the injury cannot be separated from notice that the cause involved negligence.<sup>148</sup> Based on the example, the *Drazan* standard goes far beyond the *Harrison* and *Allen* standard as to the type of knowledge required, because it includes an element of negligence. As a result, it requires notice specifically rejected by the *Kubrick* Court, notice of negligence.

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<sup>145</sup>*Id.* at 59.

<sup>146</sup>*Id.* This consequence may be ghoulish, but it would prevent situations like the one that arose in *Drazan*. If an individual goes to a hospital for treatment, and the treatment results in a worsening of the original condition or death, it could reasonably be argued that this is a suspicious circumstance. Certainly the plaintiff should wonder why the treatment did not work. Requiring an examination of the medical records is not an onerous requirement.

<sup>147</sup>*Id.* at 60.

<sup>148</sup>*Kubrick*, 444 U.S. at 127.

In *Nemmers v. United States*,<sup>149</sup> the Court of Appeals for the Seventh Circuit reexamined the type of knowledge required to trigger the running of the statute. The issue in the case was whether negligent medical care at birth caused a child to have cerebral palsy or muscular dystrophy. The plaintiffs had received a medical report in 1977 that indicated the child's injuries could have resulted either from birth trauma, or from a "high fever illness" during the third month of pregnancy. They did not file a claim, however, until several years later. The court noted that a plaintiff did not have to know the certain cause of an injury, because even after a trial the cause may not be known with absolute certainty.<sup>150</sup> What is required is that a plaintiff know a potential cause.

The court said that the plaintiff does not have to believe the "suspicious event is more likely than not the cause,"<sup>151</sup> because discovery proceedings may be required to identify the most likely cause. This is true whether the injury is induced by a physician (iatrogenic) or whether it is caused by the worsening of a preexisting condition because of failure to diagnose or treat the condition. The standard of accrual is that the statute of limitations begins to run "when a reasonable person would know enough to prompt a deeper inquiry into a potential cause."<sup>152</sup>

As an example of a "suspicious event," the court suggested that a physician might have said there was a chance that circumstances at birth caused the injury.<sup>153</sup> This suspicious event is much more neutral than the example of the suspicious circumstance the court gave in the *Drazan* case. Here, the example does not clearly imply negligence. It is more in line with the *Harrison* and *Allen* standard, which simply requires some knowledge of causation. In *Nemmers* the knowledge of a suspicious event is simply knowledge of a potential cause. The court retreated from the *Drazan* standard of accrual that combined notice

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<sup>149</sup>795 F.2d 628 (7th Cir. 1986). For a more complete discussion of the facts of *Nemmers*, see *infra* text accompanying notes 208–17.

<sup>150</sup>795 F.2d at 631. This statement seems to conflict with the court's statement that the statute would not begin to run if a competent medical professional disagreed with an injured party's assertion that the government was responsible for his injury. *Id.* This ignores *Kubrick's* guidance that negligent or mistaken advice would not prevent the running of the statute. *Kubrick*, 444 U.S. at 124. Later in the opinion, however, the *Nemmers* court also states that the time period of the statute of limitations may run even if the plaintiff was told the government was not negligent. *Nemmers*, 795 F.2d at 632.

<sup>151</sup>795 F.2d at 631.

<sup>152</sup>*Id.* at 632.

<sup>153</sup>The court stated the term "birth trauma" could refer to either a normal birth or to a difficult birth. Further, a reasonable person could believe this meant medical care at the time of birth did not cause the injury. *Id.* at 631.

of causation with notice of negligence.<sup>154</sup> The *Nemmers* suspicious event or knowledge of a potential cause test is consistent with *Kubrick*. Once on notice of a potential cause, the plaintiff can further investigate that cause, determine whether negligence was involved, and decide whether to file a claim.

## **VI. LACK OF KNOWLEDGE OF TORT- FEASOR'S STATUS AS AN AGENT OF THE GOVERNMENT, OR OF GOVERNMENT CONDUCT AS A POSSIBLE CAUSE OF INJURY**

### **A. GOVERNMENT AGENTS AS DRIVERS**

Several courts faced plaintiffs who failed to discover the employment status of the individual who inflicted their injuries until after the time for filing the required administrative claim expired. Since *Kubrick*, this has occurred in several cases in which federal employees negligently injured others while driving motor vehicles. Courts are divided on the issue of whether accrual of the claim against the government is postponed until the plaintiff is aware of potential government involvement.

In *Wollman v. Gross*,<sup>155</sup> Jake Gross, a government employee, drove his personal car from a government office to his home, which was his duty station for mileage reimbursement purposes. On the way he collided with one of his neighbors. Neither individual thought Gross was driving in the scope of his employment, and Gross did not report the accident to his government office. Gross's personal insurance company recognized that he was driving within the scope of his employment after a suit was filed against him more than two years after the accident.

The court held the claim accrued on the date of the accident rather than the date the plaintiff discovered Gross was driving within the scope of his federal employment.<sup>156</sup> The court reasoned that, at the time of the accident, the plaintiff knew Gross was employed by the government. The only thing he did not know was the legal significance of Gross's federal employment. The court noted that the statute of limitations exists to encourage reasonably diligent presentation of claims against the government. As a result, plaintiffs may be required

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<sup>154</sup>The different example may only be because *Drazan* was a failure to diagnose case. See *infra* text accompanying note 233.

<sup>155</sup>637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

<sup>156</sup>637 F.2d at 547.

to obtain legal advice about the possible ramifications of the facts of a particular claim, to ensure timely presentation of the claim.<sup>157</sup>

In *Gross*, the government bore no responsibility for plaintiff's late filing. The only thing *Gross* did not do that he should have done was to notify his superiors of the accident. The government did not lull the plaintiff into failing to exercise his rights promptly.<sup>158</sup> The plaintiff had not even filed a claim with *Gross's* insurer until after two years had passed, and even though he knew *Gross* was a government employee, he did nothing to investigate whether there was government involvement. The court questioned whether the plaintiff was "blamelessly ignorant."<sup>159</sup>

In *Wilkinson v. United States*,<sup>160</sup> the Fourth Circuit relied on *Wollman* when it affirmed the dismissal of a suit as untimely. The case involved a sailor who struck a pedestrian while driving within the scope of his employment. The plaintiff knew the driver, Gray, was a sailor. Additionally, Gray notified his commanding officer of the accident. The court noted that the government did not lull the plaintiff into a false sense of security, and that the plaintiff's lawyer did nothing to investigate the legal effect of Gray's federal employment at the time of the accident. The court stated that the plaintiff should have known that an inquiry into the scope of employment issue was required.<sup>161</sup> Gray's commanding officer, to whom Gray reported the accident, had no duty to supply information to the plaintiff or his attorney.<sup>162</sup>

The District Court for the Northern District of New York reached a different result in *Van Lieu v. United States*.<sup>163</sup> These, the court

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<sup>157</sup>*Id.* at 549.

<sup>158</sup>"Compare *Gross with Kelly v. United States*, 568 F.2d 259 (2d Cir.), *cert. denied*, 439 U.S. 830 (1978). In *Kelly*, the plaintiff filed a claim in state court. The United States waited until after the two-year period for filing the claim expired, and then removed the case to federal court and requested the court to dismiss the case on statute of limitations grounds. The court found that the government lulled the plaintiff into a false sense of security and allowed the claim. *Kelly*, 568 F.2d at 262.

<sup>159</sup>*Wollman*, 637 F.2d at 549 n.6.

<sup>160</sup>677 F.2d 998 (4th Cir.), *cert. denied*, 459 U.S. 906 (1982). For a discussion of *Wilkinson* as a case restricting *Kubrick* to medical malpractice cases, see *supra* text accompanying notes 77-83.

<sup>161</sup>677 F.2d at 1000.

<sup>162</sup>The court stated that Gray's commanding officer did not know the government was the proper defendant because "after all, he was a sailor, not a lawyer. (Even a sea lawyer should not be charged with knowledge of such legal intricacies)." *Id.* The court also distinguished *Kelly v. United States*, 568 F.2d 259 (2d Cir. 1978), where the government lulled a plaintiff into a false sense of security by waiting until the statute of limitations ran for filing an administrative claim and then raised the issue in a previously filed suit.

<sup>163</sup>542 F. Supp. 862 (N.D.N.Y. 1982).

allowed a late action against the United States where the driver, an Army captain, did not disclose his military status to the plaintiff or police accident investigator. The court noted that the plaintiff filed a timely state claim and that she did not voluntarily involve herself with the government. The court stated the government did not have a duty to disclose its involvement to every potential claimant, but here, the government withheld the information necessary to identify the government as a defendant so that a proper claim could not be filed.<sup>164</sup>

The court distinguished Wollman by noting that in Wollman the driver did not inform his superiors of the accident, but rather simply notified his private insurance company. Therefore, the government could not identify itself as the proper party defendant. The court reasoned that “[i]f it were not for the irresponsible behavior of the defendant in withholding his military identity while ostensibly in the course of his military responsibilities, the plaintiff could have been in a position to fully comply with the [required] administrative requirement.” ~ ~ ~

Interestingly, the court did not consider Kubrick, but quoted a district court case, *Harris v. Burris Chemical, Inc.*,<sup>166</sup> for the proposition that

[w]here the driver of a motor vehicle is sued individually in state court because the plaintiff did not know and had no reason to know that the defendant was (1) a federal employee (2) on federal business at the time of the accident and the United States subsequently removes the action to federal court . . . no exhaustion of administrative remedies is required.<sup>167</sup>

The court’s analysis suggested that it felt the government was guilty of bad faith in Van Lieu and that the government lulled the plaintiff into a false sense of security. The captain was required to have a military driver’s license, but he only presented a civilian one to both the plaintiff and police accident investigator.

This result, however, is not supported by Kubrick. At the time of the accident, the plaintiff knew who injured her. The captain did not actively conceal his government affiliation. There is no suggestion the captain would have denied his military affiliation if he had been

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<sup>164</sup>“*Id.* at 866.

<sup>165</sup>*Id.* at 868.

<sup>166</sup>490 F. Supp. 968 (N.D. Ga. 1980).

<sup>167</sup>552 F. Supp. at 865 (quoting *Harris*, 490 F. Supp. at 971)

asked. Nor does it seem unreasonable to expect the plaintiff to investigate the captain's employment status and whether someone else could be vicariously liable for his alleged negligence.<sup>168</sup>

The primary difference between the *Van Lieu* case and *Wollman* and *Wilkinson* is that in *Van Lieu* the plaintiff did not know the tortfeasor's government affiliation. In both *Wollman* and *Wilkinson* the plaintiffs were aware of the affiliation, but unaware of the legal effect of that affiliation. In all three cases, all the plaintiffs had to do was to ask in order to determine that the government should have been a defendant.

Kubrick was required to ask about the legal effect of his injury and its cause to determine whether to file his claim. The *Van Lieu* court should have applied *Kubrick* and required the plaintiff to ask if any other individuals or parties could be legally responsible for the captain's automobile accident.<sup>169</sup>

### ***B. LACK OF KNOWLEDGE OF GOVERNMENT CONDUCT AS A CAUSE OF INJURY***

The *Drazan* court also considered the issue of whether the government cause of an injury must be known for the claim to accrue.<sup>170</sup> It explained that when there are two causes of an injury, one of which is a government cause, the claim will not accrue for statute of limitations purposes until the government cause is known.<sup>171</sup>

The court used as an example the situation of someone who is struck by a postal van and dies. The driver of the van does not stop, but flees. The cause of death is the injuries suffered in the accident. The cause of the accident is the postal service van. The court stated the statute of limitations would not run until the claimants know, or should know, that the postal service caused the accident.<sup>172</sup>

The *Drazan* court chose an example that implies government fault, here, a hit and run automobile accident with government participation actively concealed.<sup>173</sup> A better example would have been one of

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<sup>168</sup>It is reasonable to impose a duty to investigate the legal identity of a tortfeasor and determine whether any other entity is vicariously liable for the tortfeasor's conduct. *Liuzzo v. United States*, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980).

<sup>169</sup>*Id.*

<sup>170</sup>*See supra* notes 142–48 and accompanying text.

<sup>171</sup>*Drazan*, 762 F.2d at 59.

<sup>172</sup>*Id.*

<sup>173</sup>Government concealment of its participation defers claim accrual. *See infra* notes 289–302 and accompanying text.

the government employee within-the-scope-of-employment cases, where no active concealment is involved.<sup>174</sup> In those cases, the plaintiffs simply did not inquire about information readily available.<sup>175</sup>

The *Drazan* court relied on the Fifth Circuit case, *Waits v. United States*,<sup>176</sup> as support for its decision. In *Waits*, an automobile hit the plaintiff, who was riding a motorcycle. He was taken to a Veterans' Administration hospital for treatment. The injuries and a later infection caused the amputation of the plaintiff's leg. In preparation for a suit against the driver that hit him, the plaintiff requested the hospital records. The hospital did not respond to the request for several months. Only after he received his hospital records did the plaintiff learn the hospital had improperly treated the infection in his leg. Prior to the receipt of his records, the plaintiff knew his leg was amputated because of an infection, but he did not know the Veterans' Administration failed to properly treat it. The plaintiff filed his administrative claim more than two years after he was released from the hospital.

The court held the claim did not accrue until the plaintiff knew the specific acts that caused the loss of his leg.<sup>177</sup> It reasoned that he could not be properly advised as to the validity of his claim without the records for an attorney or doctor to review.<sup>178</sup> Without the records, he could only state his treatment did not turn out as he hoped it would.<sup>179</sup>

The *Waits* court relied on its *Quinton*<sup>180</sup> decision rather than fully embracing *Kubrick*. Although it noted *Kubrick* did not protect a plaintiff ignorant only of the legal significance of a known act or injury, it analyzed the facts in terms of discovering "the specific acts of negligence causing his injury."<sup>181</sup>

<sup>174</sup>See, e.g., *Wilkinson v. United States*, 677 F.2d 1978 (4th Cir.), cert. denied, 459 U.S. 906 (1982); *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

<sup>175</sup>See *supra* notes 155–62 and accompanying text.

<sup>176</sup>611 F.2d 550 (5th Cir. 1980).

<sup>177</sup>*Id.* at 552–53.

<sup>178</sup>*Id.* at 553. If a plaintiff is in possession of the facts about the harm done to him, he can protect himself by obtaining advice from doctors and lawyers. *Kubrick*, 444 U.S. at 123.

<sup>179</sup>The court stated that mere dissatisfaction with the results of treatment is not equated with knowledge of negligence. *Waits*, 611 F.2d at 553. *Kubrick* does not require knowledge of the legal cause of injury, i.e. negligence, only knowledge of the factual cause of the injury. The *Drazan* court also expressed concern that the *Waits* opinion suggested the statute of limitations would not run until the plaintiff knew he was a victim of negligence. *Drazan*, 762 F.2d at 59.

<sup>180</sup>See *supra* notes 10–14 and accompanying text.

<sup>181</sup>611 F.2d at 552 (quoting *Quinton v. United States*, 304 F.2d 234, 235 (5th Cir. 1962)).



Waits knew his infection resulted from having a contaminated pin placed in his leg. His condition worsened under Veterans' Administration care. He contacted a non-VA doctor, who demanded that Waits be released for treatment at a different hospital. The court said that these facts were not the basis of the allegation of negligence, therefore they should not be considered in determining when the claim accrued for negligent failure to treat the infection.<sup>182</sup>

Waits, however, should have known that the VA set in motion the chain of events that resulted in the loss of his leg. He should have inquired about the legal effect of the VA's failure to treat an infection that it started. In terms of the *Drazan* example, the contamination pin was the postal service van that caused the injury. Nevertheless, the *Waits* court said that this act may not have been negligent; Waits had to know the specific acts of negligence, the specific failures that allowed the infection to continue.<sup>183</sup>

Again, using the *Drazan* accrual standard, knowledge that Veterans' Administration doctors implanted a contaminated pin in his leg was a "suspicious circumstance" that should have immediately triggered a duty of further investigation. Waits should have requested his medical records in order to seek advice about the validity of a claim against the government. In any case, Waits knew facts that pointed to government responsibility for his injury prior to receipt of the medical records. This is all *Kubrick* required. Armed with these facts he should have sought medical and legal advice.

Arguably, proper application of the *Kubrick* standard could have achieved the same result. The government withheld the medical records. Even if the claim accrued when Wait knew that doctors implanted a contaminated pin, the limitations period could have been tolled while the facts of causation were "in the hands of the putative dependant, unavailable to the plaintiff or at least very difficult to obtain."<sup>184</sup>

Courts do not universally accept the philosophy of deferral until government causation is known. In *Dyniewicz v. United States*,<sup>185</sup> the

<sup>182</sup> 611 F.2d 551-53.

<sup>183</sup> The court found infections resulting from severe injuries were a common problem and did not necessarily indicate negligent treatment. *Id.* at 553.

<sup>184</sup> *Kubrick*, 444 U.S. at 122; *see also* Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982) (government failure to release medical records was concealment of facts and prevented accrual of the claim). Alternatively, the court could have required Waits to file his claim within two years of the time he learned that doctors implanted a contaminated pin. At this time he was not certain of the specific acts that caused the injury, but he knew that the government caused the infection and then failed to treat it. He could have discovered the specific reason the government did not treat the infection after he filed his claim. *See* Nemmers v. United States, 795 F.2d 631, 632 (7th Cir. 1986) (plaintiff may file a claim and use discovery to bring out essential facts).

<sup>185</sup> 742 F.2d 484 (9th cir. 1984).

Ninth Circuit rejected an argument that the statute of limitations should be tolled until the plaintiff becomes aware of the government's involvement in the plaintiff's injury.<sup>186</sup> The plaintiff's parents died when flood waters washed their car away. During a state suit more than two years after the deaths, plaintiffs discovered that the National Park Service rangers responsible for the area may have been negligent, and that this negligence may have caused the accident.

The court held the claim accrued at the time the bodies were found, in keeping with the general rule of tort law that a claim accrues at the time of injury.<sup>187</sup> The court reasoned that the discovery rule was inapplicable, because discovery of the cause of the injury means discovery of the physical cause only. It does not include knowing who is responsible.<sup>188</sup>

The court also distinguished government silence about the rangers' negligence from fraudulent concealment. In the opinion of the court, the government has no duty to announce that it has been negligent.<sup>189</sup> Silence alone, therefore, did not toll the running of the statute.

The District Court for the District of Columbia reached a similar result in *Marbley v. United States*.<sup>190</sup> In that case, the plaintiff's wife was murdered while working as a custodian at the Washington Navy Shipyard. A court convicted a former employee at the yard of the murder over a year later. Two years after that, the plaintiff filed an administrative claim, and ultimately filed suit for wrongful death. The court held the claim was untimely because the action accrued when the body was found, rather than when the killer was convicted.<sup>191</sup> The court found no reason to delay filing the claim until the murderer was convicted.<sup>192</sup>

In *Zelevnik v. United States*<sup>193</sup> the Third Circuit affirmed the dismissal of a suit against the government for negligent failure to retain

<sup>186</sup> *Id.* at 487.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*; see also *Davis v. United States*, 642 F.2d 328 (9th Cir.), *cert. denied*, 455 U.S. 919 (1982) (knowledge of government cause not necessary to start running of statute of limitations; knowledge of physical cause is sufficient). *But cf.* *Liuzzo v. United States*, 485 F. Supp. 1274 (E.D. Mich. 1980) (due to government coverup, claim did not accrue until plaintiffs knew of government's involvement).

<sup>189</sup> 742 F.2d at 487. *Contra* *Van Lieu v. United States*, 542 F. Supp. 862 (N.D.N.Y. 1982) (government should notify plaintiff of its involvement and identity when plaintiff is involved with government tortfeasor).

<sup>190</sup> 620 F. Supp. 811 (D.D.C. 1985).

<sup>191</sup> *Id.* at 813.

<sup>192</sup> When the body was found, the plaintiff knew both the injury and its cause. He could have filed a claim against the government at that time. The court distinguished *Liuzzo v. United States*, 485 F. Supp. 1274 (E.D. Mich. 1980) where the plaintiff was unaware of government involvement as a cause of injury. *Marbley*, 620 F. Supp. at 813.

<sup>193</sup> 770 F.2d 20 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

an illegal alien after he attempted to turn himself in to the Immigration and Naturalization Service (INS). In *Zelevnik*, an illegal alien murdered the plaintiffs' son. After the murder, the plaintiffs investigated the murderer's background and learned that a state psychiatric hospital released him shortly before the murder. They did not discover that he unsuccessfully tried to turn himself in to the Immigration and Naturalization Service. The murderer told an INS employee that he had a fraudulent United States passport and that he had been involved in an illegal drug transaction. The Zelevniks learned this eight years after the murder, and within two years filed an administration claim alleging INS negligence. The claim and a later district court action were dismissed as untimely.

The court noted that *Kubrick* admonished lower courts to construe the FTCA statute of limitations so as not to extend it beyond the point intended by Congress.<sup>194</sup> The court observed that the Zelevniks knew who killed their son at the time of his death. The court held that the discovery of the cause of one's injury does not mean knowing who is responsible, but rather that "cause" implies only the physical cause.<sup>195</sup> The court distinguished the case relied on by the Zelevniks as a case of active concealment by the government.<sup>196</sup>

The court also rejected the Zelevniks' arguments that, if a reasonably diligent investigation does not discover the government's action, the claim should not accrue. The court noted that *Kubrick* started the running of the statute even where the plaintiff received erroneous advice about the validity of his cause of action. Thus, once a plaintiff knows that he has been injured and the immediate cause of the injury, reasonable diligence becomes irrelevant for statute of limitations purposes. ~ ~ ~

The court reasoned that Congress decided two years from accrual of the claim was sufficient time for a claimant to discover any facts necessary and determine whether to file a claim. The purpose of the statute of limitations was not to guarantee that every possible claim against the government was presented.<sup>198</sup> In some situations two years will not be enough time to present a claim and in others it will be too much.

The results in these cases may seem harsh, but they are consistent with *Kubrick*. A plaintiff who is aware of an injury and its physical

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<sup>194</sup>The FTCA provided only a limited waiver of the sovereign immunity of the United States. 770 F.2d at 22.

<sup>195</sup>*Id.* at 23.

<sup>196</sup>*Id.*

<sup>197</sup>*Id.* at 24.

<sup>198</sup>*Id.*

cause is in the same position as any other plaintiff.<sup>199</sup> He must then investigate all the aspects of his claim and “determine whether and whom to sue. *Kubrick* makes this plain.”<sup>200</sup>

*Kubrick* required a plaintiff to determine whether fault was involved in the cause of his injury. In making this determination, the court said that a plaintiff can seek advice if he is unable to make the decision on his own.<sup>201</sup> Thus, an investigation into fault is required. As part of this investigation, the plaintiff should determine whether any other entity shares fault for the cause of the harm.<sup>202</sup> The *Dyniewicz*, *Marbley*, and *Zelesnik* courts merely required the plaintiffs to determine the existence of fault once on notice of injury and its cause. The government did not conceal its participation or identity in these cases. Therefore, the government did not prevent the plaintiff from finding out about its participation in causing the injury. As the *Zelesnik* court said, the statute of limitations does not guarantee that a claim can be presented, it merely provides a time during which some claims may be presented.<sup>203</sup>

## VII. SUBJECTIVE AND OBJECTIVE COMPONENTS OF THE *KUBRICK* ACCRUAL STANDARD

*Kubrick* quoted, with apparent approval, the Restatement of Torts<sup>204</sup> in its discussion of the doctrine of “blameless ignorance”.<sup>205</sup> The “blameless ignorance” accrual standard that was presented stated that “the statute [of limitations] must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it.”<sup>206</sup> This accrual test is composed of a subjective component, “the plaintiff has in fact discovered”, and an objective

<sup>199</sup> *Kubrick*, 444 U.S. at 124.

<sup>200</sup> *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1982) (claim for polio caused by polio vaccine accrued when plaintiff realized the vaccine caused his disease).

<sup>201</sup> 444 U.S. at 123–24.

<sup>202</sup> *Cf. Liuzzo v. United States*, 485 F. Supp. 1274, 1283 (E.D. Mich. 1980) (obligation to investigate legal identity of tortfeasor and other entities’ vicarious liability for tortfeasor’s conduct is reasonable).

<sup>203</sup> 770 F.2d at 24. *Kubrick* noted that Congress extended the FTCA statute of limitations from one year to two years to increase the number of claimants who could discover that they had a potential claim before the limitations period ran. 444 U.S. at 120 n.6. Presumably, even though the limitations period was doubled, there will still be plaintiffs who will not have enough time to file a claim, even with the exercise of reasonable diligence.

<sup>204</sup> Restatement (Second) of Torts (1979).

<sup>205</sup> 444 U.S. at 120 n.7.

<sup>206</sup> *Id.* (quoting Restatement (Second) of Torts 0899, comment e (1979)).

component “by the exercise of reasonable diligence should have discovered.” When the Court discussed the standard, it separated knowledge of the cause of the injury from knowledge of injury, and applied the “blameless ignorance” standard to each component.<sup>207</sup> Therefore, a subjective and objective evaluation should be made to determine whether the claimant knew that he was injured and whether he knew the cause of his injury.

In *Nemmers v. United States*,<sup>208</sup> the Seventh Circuit analyzed both branches of the test. *Nemmers* remanded a district court decision for a proper determination of whether a medical malpractice claim was timely filed.

Eric Nemmers was born in July 1973 after his mother experienced a difficult labor. Mrs. Nemmers came to a Navy hospital complaining of pain. Navy doctors did not perform any tests and told Mrs. Nemmers to go home and stay there until she had regular pains five minutes apart. Mrs. Nemmers called and complained of irregular pains, but was told to stop calling until they became regular. After two days of irregular pains, she went back to the hospital, where a Cesarean section was performed.<sup>209</sup>

By the time Eric was eighteen months old, his parents knew he had cerebral palsy or muscular dystrophy. They also learned Eric was retarded. From 1973 until 1976, Eric’s treating physician stated he did not know what caused Eric’s condition. In 1977, Eric’s parents took him to a new physician, who wrote a report that stated Eric’s condition could have been caused by the “severe influenza-like high fever illness” Mrs. Nemmers experienced during the third month of pregnancy with Eric.<sup>210</sup> He also said the difficult labor and delivery could have contributed to Eric’s condition. Unbeknownst to the doctor, Mrs. Nemmers had not had a “severe influenza-like high fever illness,” but rather, merely had a cold.<sup>211</sup>

In spite of this, the Nemmers contended the two-year limitations period did not begin to run until 1981, when they read a newspaper article about a child who suffered from problems like those Eric experienced as a result of negligent care at delivery. The district court agreed that the medical advice the Nemmers received prior to 1977 diverted them from the information in the 1977 report. The district court also found that at the time the Nemmers received the report,

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<sup>207</sup> 444 U.S. at 122.

<sup>208</sup> 795 F.2d 628 (7th Cir. 1986).

<sup>209</sup> *Id.* at 629.

<sup>210</sup> *Id.* at 630.

<sup>211</sup> *Id.*

they were no longer trying to assess the blame for Eric's condition.<sup>212</sup> They were trying to rehabilitate him.

The court of appeals said this analysis was faulty because the district court used a subjective standard, rather than the objective standard required by *Kubrick*.<sup>213</sup> The court of appeals determined the test, "knew or should have known of the cause of injury," comprised both an actual knowledge and an objective component.<sup>214</sup> Whether the plaintiff actually had knowledge is a subjective inquiry. Whether a plaintiff should have known, based on the information available and applying a reasonable man standard, is an objective inquiry. The court concluded that, if a medical report stated there was a significant chance that an event caused an injury, then there was sufficient notice of cause to require a plaintiff to begin an inquiry.<sup>215</sup>

In remanding the case, the court offered the district court the guidance that the term "birth trauma", contained in the 1977 report, might be too ambiguous standing alone to place a reasonable person on notice that medical care at the time of birth could have caused Eric's problems. The court went on to note, however, that the Nemmers knew that, contrary to the information in the report, Mrs. Nemmers did not suffer severe influenza during pregnancy. This, along with the knowledge that she was in unsupervised labor for over two days prior to the birth, could indicate a "significant chance" that medical treatment or the absence of supervision near the time of birth may have been a causal factor.<sup>216</sup>

Finally, the court noted that the Nemmers bore the burden to show that they had no reason to believe the government caused Eric's condition because the government showed the suit was untimely.<sup>217</sup>

Nemmers is a stark contrast to the Seventh Circuit case of *Jastremski v. United States*.<sup>218</sup> In *Jastremski*, the court affirmed a district

<sup>212</sup>*Id.* at 630-31. (quoting *Nemmers v. United States*, 621 F. Supp 928,930-31 (C.D. Ill. 1985)).

<sup>213</sup>795 F.2d at 631.

<sup>214</sup>*Id.*

<sup>215</sup>A plaintiff is not required to search his medical records to determine if the government injured him if there is nothing that would indicate the government may have caused the injury. Nor is a plaintiff required to search his records simply because he believes the government may have injured him. If a competent medical professional advised a plaintiff there was a "20% chance that the problem comes from the circumstances of birth," however, the plaintiff would be under a duty of further inquiry. *Id.* at 631-32.

<sup>216</sup>*Id.* at 633.

<sup>217</sup>*Id.* Although statute of limitations is an affirmative defense, once the government establishes that a claim was not filed in a timely manner, the burden is on the plaintiff to establish that he had no reason to believe the government caused the injury. *Drazan*, 762 F.2d at 60.

<sup>218</sup>737 F.2d 666 (7th Cir. 1984).

court decision that a claim for injuries caused by a traumatic birth did not accrue until approximately four years after that birth. Doctors gave drugs to Theodore Jastremski's mother to induce labor, but, against her wishes and the wishes of her pediatrician husband, they also administered a spinal anesthetic. The anesthetic dosage was too large and the contractions stopped. Theodore was being born in the breech position. The doctor in attendance instructed Dr. Jastremski and a nurse to push as hard as they could against Theodore's head through the mother's abdomen. At this time the doctor pulled Theodore from his mother.

Fifty one hours later, Theodore suffered grand mal seizures. Tests administered at the time did not disclose the cause of the seizures. At the suggestion of hospital personnel, a pediatric neurologist examined Theodore upon his discharge. The neurologist was unable to find a neurological cause for the seizures.

Theodore developed a problem walking when he was two and received treatment from two orthopedic specialists. Neither of these individuals told the Jastremskis that the problems could be neurological. When Theodore was four years old, a neurologist visiting the Jastremskis' home saw Theodore and mentioned that he might have cerebral palsy. This opinion proved correct and the Jastremskis filed an administrative claim when Theodore was five years old. In the suit that followed, the district court found the government was negligent at the time of birth and the negligence caused Theodore's brain injury during birth.

The court of appeals said the minority does not toll the running of the statute of limitations, and then cited the *Kubrick* accrual standard.<sup>219</sup> The court first applied the subjective test: does the plaintiff know the injury and its cause? It noted that Dr. Jastremski testified that neither he nor his wife suspected Theodore had brain damage until doctors diagnosed the cerebral palsy when Theodore was four years old. The court found this testimony plausible, although it thought that the seizures shortly after birth and later the walking problems could have been regarded by a doctor as manifestations of a neurological injury.<sup>220</sup> The court refused to impute to Dr. Jastremski, "contrary to his testimony, knowledge he did not have in 1973 or before; namely, that his son suffered from a brain injury and that such an

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<sup>219</sup>*Id.* at 669; *see also* *Robbins v. United States*, 624 F.2d 971, 972 (10th Cir. 1980) (it is well established that a claimant's minority does not toll the running of the FTCA statute of limitations).

<sup>220</sup>The tenor of the opinion indicated that the court did not strongly approve of the district court's decision. The court said it would not disturb that decision because the decision was not clearly erroneous. 737 F.2d at 670.

injury was caused by acts of the defendant when Theodore was born.”<sup>221</sup> After it completed the subjective test, the court applied an objective test. It reviewed the Jastremskis’ activity after Theodore’s birth and concluded they exercised reasonable diligence in attempting to identify Theodore’s injury and its cause and failed.<sup>222</sup>

At trial, Dr. Jastremski testified as an expert that the extended labor and undue pressure on Theodore’s head during the birth caused Theodore’s injuries. The court stated it was not inconsistent for Dr. Jastremski to testify as an expert on the basis of information he had at the time of trial and yet be unaware of the cause of his son’s injury earlier.<sup>223</sup>

*Jastremski* is interesting because Dr. Jastremski knew that the standard of care was violated before the injury manifested itself. He also knew that his son suffered seizures shortly after birth. Hospital personnel advised him that he should consult a civilian neurologist for his son’s seizures. Therefore, he knew that some sort of neurological irregularity existed.

At that time, Dr. Jastremski knew that his son received negligent treatment and that he had an injury, or at least a neurological abnormality. The only thing Dr. Jastremski did not have was direct evidence of the connection between the negligent health care and the neurological problems. The *Nemmers* court would probably have decided the case differently. Applying its objective standard of whether Dr. Jastremski should have known the cause of the injury, the court would have held he was aware of a potential cause.<sup>224</sup> Armed with awareness of a potential cause, Dr. Jastremski’s subsequent inquiry to the civilian neurologist would have been characterized as the type of consultation of experts referred to in *Kubrick*, in which an erroneous response does not defer accrual of the claim.<sup>225</sup>

In *Kubrick* the consultation was to determine whether the standard of care was violated. Even in *Kubrick*, there was uncertainty about whether the drug caused Kubrick’s deafness.<sup>226</sup> In *Jastremski*, the consultation was on the issue of the likelihood of causation. Erroneous advice in such a setting should not prevent the running of the statute

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<sup>221</sup>*Id.*

<sup>222</sup>*But see* *Zelevnik v. United States*, 770 F.2d 20, 24 (3d Cir. 1985) (unsuccessful exercise of reasonable diligence does not toll running of FTCA statute of limitations).

<sup>223</sup>737 F.2d at 671. *But cf.* *Arvayo v. United States*, 766 F.2d 1416, 1418 (10th Cir. 1985) (testimony of government doctors on behalf of government rejected as biased).

<sup>224</sup>*Nemmers*, 795 F.2d at 631–32; *see also supra* notes 150–52 and accompanying text.

<sup>225</sup>795 F.2d at 632.

<sup>226</sup>*Id.* at 631.



of limitations. There is no reason to burden the government with the delayed claim that resulted from the erroneous advice.

The results of the *Nemmers* court's subjective test would probably be the same because it is unlikely the court would find that Dr. Jastremski lied.

Another court that considered the duty of inquiry by the plaintiff changed the duty to one of disclosure by the defendant. In *Wilson v. United States*,<sup>227</sup> the District Court for the Middle District of Alabama considered a claim that failure to properly diagnose and treat a ruptured appendix ten years earlier resulted in sterility.

The court said that, at the time of her injuries, the doctor treating the plaintiff did not tell her about her injuries in a way that was meaningful to either her or her mother. The doctor did not specifically say that the plaintiff would not be able to have children, but merely told her there was severe internal scarring. According to his testimony, he told the plaintiff and her mother that her fallopian tubes were severely scarred. The court imposed a duty on the doctor to tell the plaintiff the full extent of her injuries.<sup>228</sup> It stated that the doctor failed to clearly disclose to the plaintiff that the injuries she sustained created a probability of sterility. Therefore, the statute of limitations was tolled until the plaintiff actually knew she was sterile and why.<sup>229</sup>

The court only used a subjective approach in this case. Although it quoted the *Kubrick* standard, the court said that neither the plaintiff nor her mother had any special medical knowledge that allowed them to attribute any significance to the information they were told or to the information in the medical records regarding damage to the plaintiff's fallopian tubes. The court did not apply the objective prong of the test. The objective prong would have required the court to consider whether the plaintiff or her mother should have inquired about the effect of the injury the doctor described, or sought clarification of the information in the records.<sup>230</sup>

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<sup>227</sup> 594 F. Supp. 843 (M.D. Ala. 1984).

<sup>228</sup> *Id.* at 849. This duty apparently was a duty to use language the plaintiff could understand.

<sup>229</sup> The court analogized the doctor's alleged lack of full disclosure to fraudulent concealment that tolled the running of the statute of limitations. *Id.* The court also distinguished an ordinary personal injury case from a medical malpractice case. In a medical malpractice case, a plaintiff "may not know that her doctor's negligence contributed to the injury." *Id.* The *Kubrick* court rejected this lack of knowledge as a reason to toll the running of the statute. In *Kubrick*, just as in this situation, the plaintiff could have sought advice about whether her ruptured appendix should have been diagnosed earlier.

<sup>230</sup> Lack of knowledge about the extent of injuries does not toll the FTCA statute of limitations. *Robbins v. United States*, 624 F.2d 971, 973 (10th Cir. 1980). *Wilson* distinguished this situation as one where knowledge of the extent of the injuries was necessary for the plaintiff to have a fair opportunity to assert her claim. 594 F. Supp. at 849.

The *Wilson* result is incorrect under the *Kubrick* standard. Not only did the court release the plaintiff from a duty of inquiry, but it imposed a duty of disclosure on the government. As a result, a plaintiff can allege that he did not understand the information he received and defer claim accrual indefinitely. *Kubrick* rejected this contention as excusing a failure to promptly present a claim. The Court said such a “rule would reach any case where an untutored plaintiff, without the benefit of medical or legal advice and because of the ‘technical complexity’ of the case . . . would not suspect that his doctors negligently treated him”<sup>231</sup> and would allow suit anytime beyond two years when the plaintiff finally realized the doctor was negligent.<sup>232</sup> This case demonstrates courts’ reluctance to subject injured plaintiffs to the harsh consequences of losing a claim on statute of limitations grounds.

## VIII. SEPARATE ACCRUAL STANDARD FOR FAILURE TO PROPERLY DIAGNOSE AND TREAT

### A. DUTY OF INQUIRY INTO CAUSE OF INJURY

One of the problems the court encountered in *Druzun v. United States*<sup>233</sup> was the type of injury alleged. In *Kubrick*, the harm was actively caused during a course of treatment. In *Druzun*, the harm was the failure of government doctors to promptly diagnose and treat the cancer that showed on the x-ray. In other words, *Kubrick* involved negligence in the form of commission and *Drazan* involved negligence in the form of omission.

The Tenth Circuit recognized this difference and established a duty of inquiry about causation in some failure to diagnose and treat cases. In *Aruuyo v. United States*,<sup>234</sup> the court held that the parents of a child who suffered brain damage as a result of bacterial meningitis had a duty to inquire about the full cause of the injury. The plaintiffs brought their son, Jose, to an Air Force hospital for treatment of a fever. The doctor diagnosed an upper respiratory infection, prescribed some medication and told Mrs. Arvayo to bring him back in a week if his condition did not improve. The next morning, the child was in much worse condition. His mother took him back to the Air Force hospital where the critical nature of his condition was immediately

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<sup>231</sup> 444 U.S. at 118.

<sup>232</sup> *Id.*

<sup>233</sup> 762 F.2d 56 (7th Cir. 1985); see *supra* notes 142–48 and accompanying text.

<sup>234</sup> 766 F.2d 1416 (10th Cir. 1985).

recognized. Jose was transferred to a civilian hospital for specialized care and there diagnosed as having bacterial meningitis.

Within the next several months the Arvayos were aware Jose had suffered brain damage as a result of meningitis. It was not until two years later, while discussing the child's case with an attorney assisting them with insurance coverage of Jose's meningitis, that the Arvayos discovered Jose's retardation could have been caused by a delayed diagnosis of meningitis. They filed their administrative claim more than two years after the diagnosis.

The government appealed the district court award in the Arvayos' favor and argued *Kubrick* controlled the case because the Arvayos knew Jose's injury, retardation, and its cause, meningitis, more than two years before they filed their claim. The court rejected this argument and reasoned that the cause was not only meningitis, but was also a failure to timely diagnose and treat the meningitis.<sup>235</sup> The court, however, still found that the claim was time-barred.

The court decided the Arvayos had a duty to inquire about the cause of Jose's injuries before they discovered the information from their attorney. This duty was triggered by the receipt of two very different diagnoses within a short period. Although *Kubrick* created a duty of inquiry only after a plaintiff knew both the fact of injury and its cause, the court stated that in a failure to diagnose and treat case, the extension of the duty to inquire was unavoidable.<sup>236</sup> The court explained that this requirement was not a departure from *Kubrick*, because *Kubrick* was a negligent treatment situation. There, the plaintiff's duty was to inquire whether the treatment received was negligent. In a failure to diagnose and treat situation the cause of the injury is an omission or failure. This implies the doctor failed to do what he had a duty to do. Therefore, sometimes it is not possible to distinguish between the concept of the cause of injury and negligence.<sup>237</sup>

Using the *Druzan* accrual standard leads to the same result. The two very different diagnoses within a day constituted "suspicious circumstances."<sup>238</sup> As in the *Druzan* example, the obvious implication

<sup>235</sup>*Id.* at 1419–20.

<sup>236</sup>*Id.* at 1421.

<sup>237</sup>The court noted that the *Kubrick* dissenters recognized the dilemma of attempting "to distinguish between a plaintiff's knowledge of the cause of his injury on the one hand and his knowledge of the doctor's failure to meet acceptable medical standards on the other." *Id.* (quoting *Kubrick*, 444 U.S. at 127).

<sup>238</sup>*Druzan*, 762 F.2d at 59–60. *Druzan* was also a failure to diagnose case. For this reason, the example used by the court may have implied government negligence. When the Seventh Circuit again presented an example of claim accrual in *Nemmers*, it

is that the first diagnosis, the government diagnosis, was erroneous. Therefore, not only does this circumstance indicate the government may have been the cause of injury, it also indicates the government was at fault for the injury.

Conversely, applying the *Arwayo* standard to *Druzan*, it is not altogether certain the result would be different. There, the previous x-ray was taken more than a year earlier than the one that finally revealed the existence of the large tumor. This time period could have been too great to create the *Arwayo* duty of inquiry based on disparate diagnoses. Common sense, however, could still tend to raise the question of how the cancer became so severe without being detected.

It is likely the Tenth Circuit intends for the *Arwayo* standard to be broadly construed.<sup>239</sup> The court cited *Gustavson v. United States*<sup>240</sup> to support imposing a duty of inquiry about causation in *Arwayo*.<sup>241</sup> In *Gustavson*, military doctors treated the son of an Air Force member for a bedwetting problem. During this time, the boy, Terry, also received treatment for a painful mass in his neck and for fever. The military doctors misdiagnosed the bedwetting as anxiety rather than as a vesico-ureteral reflux and the infection resulting from the condition. They also failed to connect the fever and lump in his neck to his kidney problems.

Terry's parents ultimately consulted civilian physicians who corrected the reflux problem surgically. Unfortunately, severe kidney damage occurred by this time. These doctors said the bedwetting problems were symptomatic of the reflux problems. They did not mention that the fever or mass in his neck were also related to the problem. More than two years passed before an administrative claim was filed. Because the claim was late, the court said that all claims related to the misdiagnosis should be dismissed, to include the misdiagnosis of the lump in his neck and of the fever.

The court reasoned that once Terry knew of the misdiagnosis, he had an obligation to inquire as to whether the lump in his neck and fever were also caused by the reflux problem.<sup>242</sup> He should have de-

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considered a negligent treatment case instead of another failure to diagnose and treat case. This may be the reason the *Nemmers* example of knowledge of the cause did not imply fault. See also *supra* notes 147–54 and accompanying text.

<sup>239</sup> Although the court said that not every failure to diagnose and treat case accrues at the time a plaintiff receives a diagnosis different than an earlier diagnosis, it rejected the *Arwayo*'s argument that a claim did not accrue until the plaintiff is informed of a possible connection between a misdiagnosis and an injury. 766 F.2d at 1422.

<sup>240</sup> 655 F.2d 1034 (10th Cir. 1981).

<sup>241</sup> *Arwayo*, 766 F.2d at 1419–22.

<sup>242</sup> 655 F.2d at 1036–37.

terminated whether his doctors should have diagnosed the kidney problem based on the fever and lump. The court held that the doctors who told him that his bedwetting was caused by the reflux could have also told him the other problems were caused by it.<sup>243</sup> All he had to do was ask.

*Arvayo's* holding, that a duty of inquiry exists as to the cause of injury, does not leave a "blamelessly ignorant" claimant unprotected. The Arvuyo court reasoned that the Arvayos' failure to inquire was unreasonable. They received widely different diagnoses within a short time and they knew Jose's injury was caused by the meningitis, yet they failed to ask if there was a connection. "A plaintiff who remains ignorant through lack of diligence cannot be characterized as 'blameless.'"<sup>244</sup> While Aruuyo required a plaintiff to inquire as to both causation and negligence in a failure to diagnose and treat setting, the result is consistent with *Kubrick*. In both situations, a potential claimant must exercise reasonable diligence in deciding whether to present a claim.

## B. INJURY REDEFINED

Another difference between a failure to diagnose and treat case and a case in which injury is inflicted during an actual course of treatment is the definition of the term "injury."

In *Augustine v. United States*,<sup>245</sup> the Ninth Circuit defined "injury" in a failure to diagnose setting. The plaintiff, Richard Augustine, consulted an Air Force dentist about having a dental plate made. The dentist informed him the plate could not be made until a small bump on his palate was treated. The dentist referred him to an Air Force oral surgeon who performed a needle aspiration of the bump and made a radiograph of Augustine's palate. He did no other tests and was unable to diagnose the cause of the bump.

During a routine physical two years later, Augustine mentioned the bump to the doctor conducting the physical. The doctor referred him to another doctor who determined the growth was cancerous. Augustine had two operations to remove the cancer, but by that time the cancer had metastasized. More than two years after the failure to diagnose the cancer, Augustine filed his administrative claim and subsequently a suit alleging negligent failure to diagnose and treat. The district court dismissed the action as untimely and Augustine appealed.

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<sup>243</sup>*Id.*

<sup>244</sup>*Arvayo*, 766 F.2d at 1423 (quoting the *Kubrick* dissent, 444 U.S. at 128).

<sup>245</sup>704 F.2d 1074 (9th Cir. 1983).

The court distinguished the situation in this case from *Kubrick*.<sup>246</sup> There, the harm was caused by an affirmative act of negligence that inflicted specifically identifiable injuries on the plaintiff. The statute of limitations began to run upon the identification of the cause of the injury. In Augustine's situation, identification of both the injury and its cause were more difficult. The court decided the injury in a failure to diagnose case "is the *development* of the problem into a more serious condition that poses greater danger to the patient or that requires more extensive *treatment*."<sup>247</sup> Therefore, accrual of the claim does not occur until the plaintiff knows the preexisting condition has developed into a more serious one.

The court said that the injury was not the bump Augustine had on his palate, but rather its development from a controllable condition into metastatic cancer. Therefore, the claim did not accrue, as the government argued, when the plaintiff consulted the Air Force oral surgeon.<sup>248</sup>

In *Raddatz v. United States*<sup>249</sup> the Ninth Circuit again considered when a claim accrued in a failure to diagnose and treat situation. There, the plaintiff, Charleen Raddatz, received an intrauterine contraceptive device (IUD) at an Army medical center after she was referred there by her Navy doctor. The device was improperly inserted and perforated the right side of her uterus. The Army doctor removed the device and told Mrs. Raddatz she would experience pain and cramping for a few days. During the next week Mrs. Raddatz made two visits to the emergency room at the medical center. An emergency room doctor noted in her records that she might have pelvic inflammatory disease.

Mrs. Raddatz went back to her Navy doctor, who told her she would continue to experience the pain and cramps. He told her these were acceptable side effects of her injury and would continue for four to six weeks. The doctor gave her codeine for the pain but no antibiotics. She consulted her Navy doctor about the pain two more times during the following week. The doctor assured Mrs. Raddatz her problems were normal and gave her more pain killers.

After two more weeks, Mrs. Raddatz developed a fever and painful urination in addition to her other symptoms. She then consulted a civilian doctor who prescribed antibiotics and, after surgery, identified her condition as pelvic inflammatory disease. Ultimately, a hys-

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<sup>246</sup>*Id.* at 1078.

<sup>247</sup>*Id.* (emphasis in original).

<sup>248</sup>*Id.*

<sup>249</sup>750 F.2d 791 (9th Cir. 1984).

terectomy was required to eliminate the pain Mrs. Raddatz experienced.

The court held that only the Army claim would be governed by the *Kubrick* accrual standard. The Navy claim should be governed by the *Augustine* standard of accrual when the plaintiff "becomes aware or through the exercise of reasonable diligence should have become aware of the development of a preexisting problem into a more serious condition."<sup>250</sup>

The *Augustine* standard is not appropriate in all failure to diagnose and treat situations. What happens, though, if the "injury" is the failure to cure a treatable condition, rather than the development of the preexisting condition into something more serious? Under *Augustine*, if a preexisting condition merely continues because of failure to diagnose and properly treat, without getting worse, the claim will not accrue for statute of limitations purposes. The government could be left vulnerable to suit indefinitely, yet the plaintiff could be aware of the fact of injury, continuation of the preexisting condition, and the possible cause, ineffective treatment. This result is inconsistent with *Kubrick's* focus on prompt investigation and presentation of claims. Therefore, the *Augustine* standard must be applied only to those situations where a preexisting condition will become worse as a result of the failure to diagnose and treat. Application of *Augustine* to all failure to diagnose and treat situations unreasonably delays accrual of the claim in violation of *Kubrick's* teachings.<sup>251</sup>

### C. UNNECESSARY TREATMENT

Occasionally a misdiagnosis results in unnecessary treatment. In those situations, the treatment provided becomes the injury. The Eighth Circuit considered this issue in *Snyder v. United States*.<sup>252</sup> The plaintiff, Donald Snyder, sought treatment for chest pains at a Veterans' Administration hospital after undergoing surgery for lung cancer. His doctor told him that he had an extensive tumor and that he had six months to live. The doctor recommended a surgical procedure to relieve the pain. The procedure was unsuccessful. Shortly thereafter,

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<sup>250</sup>*Id.* at 796 (quoting *Augustine*, 704 F.2d at 1078).

<sup>251</sup>*But see* Nicolazzo v. United States, 786 F.2d 454 (1st Cir. 1986). The plaintiff unsuccessfully sought treatment for a pre-existing condition from a variety of government doctors for ten years. Finally, he was correctly diagnosed and treated. The court held the claim accrued when the plaintiff received a correct diagnosis. In so doing, the court rejected the government's argument that the claim began to run when the plaintiff became aware the treatment he received did not help his condition. The court reasoned *Kubrick* required this result because the plaintiff did not know the cause of his injury until he finally received the correct diagnosis.

<sup>252</sup>717 F.2d 1193 (8th Cir. 1983).

Snyder discovered that he did not have a tumor and that he would not die in six months. More than two years later he filed his administrative claim and ultimately, filed suit.

Without discussion, the court held the claim was barred by the statute of limitations. It determined the claim accrued when the plaintiff discovered the procedure was unnecessary because he did not have cancer.<sup>253</sup>

Although it is not a medical malpractice case, *Ware v. United States*<sup>254</sup> presents facts that could be analogized to the facts in *Snyder*. The court also explained its decision. In *Ware* the Fifth Circuit considered a dairy farmer's claim that his cause of action against the government for negligent destruction of his cattle did not accrue when the cattle were destroyed.

During a five-year period, the Department of Agriculture tested the plaintiff's cattle for tuberculosis and destroyed 246 of them. The plaintiff filed his administrative claim more than two years after the cattle were destroyed, but within two years of when he learned the cattle did not have tuberculosis. The court defined the injury suffered as destruction of healthy cattle. It reasoned that, at the time the cattle were destroyed, the plaintiff could not identify the injury because the destroyed cattle were misdiagnosed as tubercular. It was only when the plaintiff obtained information that indicated the diagnosis was incorrect that he realized he had been injured.<sup>255</sup>

The improper treatment based on erroneous diagnosis case is different from other negligent treatment cases. Although the claimant may know the injury and its cause at the time of treatment, he does not know his injury is, in fact, an injury. Rather, he believes the injury is treatment. For example, if a doctor tells a claimant that he has cancer and that his leg must be removed to stop the spread of cancer, the patient will probably accept the treatment. If the diagnosis of cancer was erroneous, the treatment, removal of the leg, is an injury. The plaintiff knows both the injury and its cause, but it is not until he learns of the misdiagnosis that he realizes that he has been injured. Until that time, he does not know and cannot know that he has a duty to inquire whether the standard of care has been violated. Under the *Drazan* accrual standard, there must be some suspicious circumstance or suspicious event to trigger the duty to inquire.

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<sup>253</sup>*Id.* at 1195.

<sup>254</sup>626 F.2d 1278 (5th Cir. 1980). The court did not apply the *Kubrick* standard. It said the *Kubrick* standard was restricted to medical malpractice. Instead, the court used a test found in *Mendiola v. United States*, 401 F.2d 695 (5th Cir. 1968), and noted it contained the same discovery element as the *Kubrick* test.

<sup>255</sup>626 F.2d at 1284.



The results in *Snyder* and *Ware* are consistent with *Kubrick* in the sense that once a plaintiff knows his injury, in this case the wrong treatment, and its cause, he must decide within the limitations period whether to file a claim. This result also leaves the government vulnerable to claims almost indefinitely. Using the example, if the plaintiff discovered he did not have cancer ten years after his "cancer" operation, he could still file a claim. This aspect of the accrual standard is inconsistent with *Kubrick's* goal of encouraging prompt presentation of claims against the government. On the other hand, if accrual occurred earlier, an entire category of blamelessly ignorant claimants would be deprived of an opportunity to file a claim.

On balance, the result is probably consistent with *Kubrick* because a blamelessly ignorant plaintiff is protected. The alternative is to require every patient or other potential claimant subjected to an unpleasant treatment or government action to second-guess his doctors and seek legal advice to determine whether the government action was appropriate.<sup>256</sup>

## IX. SEPARATE ACCRUAL STANDARD FOR INJURY MANIFESTED AS AN EXPECTED SIDE EFFECT

Occasionally, a procedure properly performed may produce side effects, or may be unsuccessful. Claimants must determine when a side effect is actually an injury. In *Rispoli v. United States*,<sup>257</sup> the plaintiff underwent extensive treatment at a Veterans' Administration hospital for injuries he received when a car struck him. He received wounds on both legs and Veterans' Administration plastic surgeons worked for several years to close them. Although the plaintiff complained about one of his doctors, he remained in the Veterans' Administration hospital.

The plaintiffs surgeons advised him that a procedure used to close his leg wounds would be very painful and that there could be complications. The procedure involved sewing the plaintiffs arm to his leg and putting him in a cast in order to obtain a proper skin graft. During the time in the cast, the plaintiffs leg healed. Unfortunately,

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<sup>256</sup>The *Drazan* court refused to require all patients who suffered pain, illness, or death while under government care to review their records to determine whether the government might have caused their injury. *Drazan*, 762 F.2d at 59. A person undergoing treatment expects to be cured. If he isn't cured, he may wonder why. A patient who believes his leg must be amputated to prevent the spread of cancer is not likely to wonder why, however. There is no reason to inquire until the patient learns the diagnosis was incorrect.

<sup>257</sup>576 F. Supp. 1398 (E.D.N.Y.1983).

when the doctors removed the cast, the plaintiffs heel and the top of his foot came off. The doctors said this side effect could be treated and performed several operative procedures. The operations failed and Mr. Rispoli consulted a private plastic surgeon. Shortly thereafter, he filed an administrative claim and ultimately a law suit. The government argued that the claim was time barred because the plaintiff complained of the treatment he received more than two years before he filed his claim.

The court determined those complaints were about the doctor's bedside manner rather than the medical treatment he provided. The court held the claim did not accrue based on these complaints.<sup>258</sup> The court also said that the claim did not accrue when the doctors removed the cast and the plaintiff discovered that his heel and part of his foot were missing. These injuries were expected side effects that he was assured could be treated. The court stated that a plaintiff could not be charged with knowledge of his injury "where (1) he knows a procedure normally involves the type of results that also could be considered signs of malpractice; and (2) he is assured by his doctor that his pain and unseemly side effects are normal given the nature of the treatment."<sup>259</sup> The court stated that the proper time to charge a patient with knowledge of his injury is after a sufficient time has passed to put him on notice that the treatment is not successful.<sup>260</sup>

The court did not specifically determine when the claim accrued, but decided the time of accrual fell somewhere within the two years before the administrative claim was filed.

The accrual standard the court proposed is similar to the *Augustine* failure to properly diagnose and treat standard,<sup>261</sup> but it includes the element of what advice the plaintiff received from the treating physician.<sup>262</sup> This aspect could be treated as a fraudulent misrepresentation or active concealment by the government of its responsibility for the injury.<sup>263</sup> Nevertheless, it unjustifiably expands *Kubrick*.

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<sup>258</sup> *Id.* at 1402.

<sup>259</sup> *Id.*

<sup>260</sup> The court reasoned that if a patient experiences complications he was told to expect, and he is told the complications can be treated, he cannot be deemed to have knowledge of an injury. *Id.* at 1403. *But see* DeWitt v. United States, 593 F.2d 276, 280 (7th Cir. 1978) (unsuccessful surgical procedure not always malpractice).

<sup>261</sup> See *supra* note 247 and accompanying text.

<sup>262</sup> In this regard the standard is similar to the *Dubose* accrual standard. The court in *Dubose* said that the medical advice given to a claimant could defer accrual if it suggested an erroneous causal connection or laid to rest a claimant's suspicions regarding his condition. See *supra* note 139 and accompanying text.

<sup>263</sup> See *infra* notes 289–303 and accompanying text. Alternatively, the "continuing treatment" doctrine could be used to prevent accrual. While treatment by the same physician continues, the claim fails to accrue. *Page v. United States*, 729 F.2d 818, 823 n.36 (D.C. Cir. 1984).

At the time of the bad result or side effect, the injured party knows that he has been injured and the cause of his injury. This is all *Kubrick* requires. Thereafter, all a claimant needs to do is ask if he has a cause of action. If he asks, he can be told whether the result is truly a side effect, or whether the injury is a result of negligence. *Kubrick* only knew that he suffered a side effect of the treatment for his leg infection. He did not know the side effect was negligently caused. The *Rispoli* standard excessively defers a claimant's duty of inquiry. It is not consistent with the *Kubrick* accrual formula.

In *Green v. United States*,<sup>264</sup> the Seventh Circuit considered a claim by a veteran allegedly injured as a result of overexposure to radiation during treatment for oral cancer. The plaintiff, Earl Green, received treatment for two separate oral cancers at a Veterans' Administration hospital during a two-year period. Shortly after the treatment ended, Green sought treatment for oral hemorrhaging at a civilian hospital, where he underwent several surgical procedures during the next few months. Doctors told him that his problems were caused by osteoradionecrosis, dead bone tissue, as a result of radiation treatments he received for cancer. More than two years after he was told, Mr. Green filed an administrative claim that alleged that the Veterans' Administration gave him excessive doses of radiation.

Mr. Green argued that his claim did not accrue when he experienced osteoradionecrosis because his doctors warned him to expect this as a possible side effect of radiation treatment. When the condition manifested itself, the plaintiff thought he merely experienced an expected side effect. He did not realize that he was injured. Therefore, he reasoned the claim did not accrue until he experienced injuries in excess of those expected as side effects.

The court stated that *Kubrick* required the rejection of this argument. The court said that a plaintiff must seek medical or legal advice; otherwise it would undermine the goal of prompt presentation of claims against the government.<sup>265</sup> Because Green knew the facts about his injury, the court declined to excuse him from seeking medical and legal advice.<sup>266</sup>

Alternatively, Green argued that his case involved a failure to diagnose and treat his preexisting condition. He said that the court should use the *Augustine* standard of accrual, which defined the injury

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<sup>264</sup> 765 F.2d 105 (7th Cir. 1985).

<sup>265</sup> *Id.* at 108.

<sup>266</sup> The court reasoned that Green underwent eight surgical procedures and developed other problems, all of which would have put a reasonable plaintiff on notice that he needed to seek advice about the propriety of his treatment. *Id.*

as the development of his condition into a more serious one, and accrual as awareness of this development.<sup>267</sup> The court applied the *Augustine* standard and noted the result was the same. Green knew that his Condition was osteoradionecrosis when he started treatment in the civilian hospital. At this point he knew both his injury and its cause.

The *Green* court applied the *Kubrick* accrual standard. Application of this standard was easier than application of the standard proposed by the *Rispoli* court. The *Green* court simply determined when the injury manifested itself and when the doctors told Green its cause. Under the *Rispoli* test, in *Green* the court would have determined when Green realized that his condition was more than just a routine side effect. Green underwent several surgical procedures to correct the osteoradionecrosis. The court would have had to determine when in the treatment process he should have realized his side effect was an injury. This test is very imprecise because usually no specific event can be identified. *Rispoli* itself demonstrated the difficulty in defining a specific time of claim accrual. The *Rispoli* court did not specifically state when the claim accrued. It simply said *Rispoli*'s claim was filed in a timely manner.

## X. UNCERTAINTY ABOUT EXTENT AND PERMANENCE OF INJURY

Occasionally, a claimant, aware that he has been injured as a result of government negligence, fails to promptly file a claim because he is unaware of the full extent of his injury or its permanence. In *Robbins v. United States*,<sup>268</sup> the Tenth Circuit determined that a plaintiff's lack of knowledge of the degree or permanence of his injury does not prevent the running of the statute of limitations.<sup>269</sup>

When he was fifteen years old, the plaintiff, Bruce Robbins, received treatment for psoriasis from an Air Force doctor. The doctor prescribed the drug Prednisone for the condition. Bruce developed stria, marks on the skin of his thighs, back, and groin. A dermatologist told him the stria were caused by the drug but that the marks might go away as he grew older. The dermatologist also said the drug should not have been used because of Bruce's young age.

Four years later, the stria were still visible and a doctor told Bruce they may be permanent. The claim plaintiff subsequently filed was denied, and the suit he filed was dismissed because the claim was not

<sup>267</sup> *Id.* at 108–09.

<sup>268</sup> 624 F.2d 971 (10th Cir. 1980).

<sup>269</sup> *Id.* at 973.

filed in a timely manner. The court stated "a legally cognizable injury or damage begins the running of the statutory period of section 2401(b) even though the ultimate damage is unknown or unpredictable." Therefore, the claim accrued when Bruce knew the cause of the stria, and his belief that his injury was only temporary was irrelevant.<sup>271</sup>

In *Gustavson v. United States*,<sup>272</sup> the Tenth Circuit relied on *Robbins* and held that a plaintiff's claim accrued when he knew his kidneys were damaged rather than when he realized the condition was irreversible. The court stated "[l]ack of knowledge of the injury's permanence, extent, and ramifications does not toll the statute."<sup>273</sup>

*Kubrick* did not consider whether a claimant must know that an injury is permanent for the claim to accrue. Yes, as the *Kubrick* Court noted, armed with the knowledge of an injury and its cause, a plaintiff must decide whether or not to bring an action within the period of limitations." Section 2401(b) allows a two-year period for the plaintiff to wait before filing the claim. If an injury is not corrected during this period, it seems likely a reasonable plaintiff will file a claim. In any case, there is no requirement that an injury be permanent before a claim is filed. The court's holding that a claim must be filed within two years after notice of the injury and its cause, even if a plaintiff is uncertain about the extent or permanence of the injury, is consistent with *Kubrick's* goal of encouraging prompt presentation of claims.

This approach was not followed by the Eleventh Circuit in *Burgess v. United States*." There the court considered when the claim for medical malpractice should accrue against the government for injuries inflicted on a child at birth. When Omar Burgess was born in a military hospital, his clavicles were broken because his head emerged but his shoulders would not fit through the birth canal. The fracture caused Erb's Palsy, a paralysis of the muscles of the upper arm, because the fracture injured his right brachial plexus, a nerve center.

Shortly after his birth, Omar's parents knew that his clavicles were broken and that his right arm was not working properly. They did not know, however, that there was any nerve damage. Records established that twenty-four days after his birth, Omar's parents learned of the possible nerve damage. They contended that this was the first time they knew that Omar might not have full use of his right arm.

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<sup>270</sup>*Id.*

<sup>271</sup>*Id.*

<sup>272</sup>655 F.2d 1034 (10th Cir. 1981); see *supra* notes 240-43 and accompanying text.

<sup>273</sup>*Id.* at 1036.

<sup>274</sup>444 U.S. at 123-24.

<sup>275</sup>744 F.2d 771 (11th Cir. 1984).

More than two years after they learned Omar's clavicles were broken, but less than two years after they knew he had Erb's Palsy, the Burgesses filed a claim for Omar's injuries. Although the district court held the claim accrued when the Burgesses discovered Omar's clavicles were broken, the court of appeals held the claim did not accrue until they knew of the damage to his brachial plexus.<sup>276</sup>

The court reasoned that the injury to the brachial plexus was separate from the injury to the clavicles. The Burgesses did not discover the nerve injury until they were told about it. The court distinguished this case from one in which the plaintiff knows his injury and its cause, but not the extent or permanence of his injury.<sup>277</sup> The court also said the physical therapy prescribed for the arm that did not function properly was insufficient to "place a reasonable person on notice of nerve injury or other permanent injury."<sup>278</sup> Thus, the court was influenced by the permanence of the injury.

The difference the court seized upon to distinguish the facts of this case from other extent of injury cases is illusory. Any injury can be subdivided into a variety of different components. The force that broke the bone in *Burgess* probably also damaged blood vessels and other soft tissue surrounding the site of the break. Under the *Burgess* approach, each injury is treated as a separate injury, even if it manifested itself at the time of the primary injury. Until a claimant knows the specific physiological identity of an injury, the claim for that injury will not accrue.

This result is not consistent with *Kubrick*. The Burgesses knew that Omar's clavicles were broken and as a result, his right arm did not work properly. At this time they knew enough about the injury and its cause to seek advice about whether they should file a claim. The *Burgess* court, therefore, should have held that the claim accrued when the plaintiffs discovered that Omar's clavicles were broken.

## **XI. GOVERNMENT CONDUCT AS A BASIS FOR DEFERRING CLAIM ACCRUAL**

### **A. GOVERNMENT-CAUSED INCOMPETENCE**

Courts faced with a plaintiff rendered incompetent as a result of some fault on the part of the government tolled the statute of limi-

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<sup>276</sup>*Id.* at 774.

<sup>277</sup>The court distinguished *Robbins* as a case in which the only new information the plaintiff knew at the later date was the permanence of his injury. In *Burgess*, the plaintiff discovered a new injury. *Id.* at 775 & n.9.

<sup>278</sup>*Id.* at 775 n.8.

tations for the period of incompetence. This action is in contrast to the general FTCA rule that incompetence or insanity does not toll the running of the statute.<sup>279</sup> Additionally, if the government caused the incompetence, the court will likely take a subjective view of claim accrual.

The Eighth Circuit considered this issue in *Clifford v. United States*.<sup>280</sup> Allen Clifford, a twenty-four-year-old college student, received treatment from the Veterans' Administration for depression with suicidal tendencies. He took an antidepressant drug as part of his treatment. Clifford received long term prescriptions for the drug, Elavil, without checkups or re-evaluations. He took an overdose of Elavil and went into a coma that continued through the time the suit was instituted in his behalf. More than two years after the overdose, Clifford's father was appointed his guardian. Less than two years after that, his father filed an administrative claim and filed suit in Clifford's behalf.

The government argued the claim was time barred because Clifford's father and girlfriend knew of his injury and its cause when he took the overdose. The court rejected this argument, noting that Clifford "was an emancipated adult, and that neither his girlfriend nor his family had a legal duty to act in his behalf." The court reasoned that it would be unfair to penalize Clifford for these individuals' inaction. The court stressed that the conduct complained of, prescribing the Elavil, was the conduct that incapacitated the plaintiff so he was unable to realize his cause of action.<sup>282</sup>

The court distinguished this situation from nongovernment-caused incapacity, insanity, infancy, or death, none of which toll the statute.<sup>283</sup> It stated the government would be able to profit from its wrongs because the injury the government caused would prevent the plaintiff from bringing his action at a time when no one else had a legal duty to do so. The court conceded, however, this decision could leave the government open to suit indefinitely.<sup>284</sup>

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<sup>279</sup>*See* *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976).

<sup>280</sup>738 F.2d 977 (8th Cir. 1984).

<sup>281</sup>*Id.* at 979.

<sup>282</sup>*Id.*

<sup>283</sup>The court reasoned that "[W]hen a person is an infant, there are others legally responsible for his or her well-being. The parents or guardians would be under a duty to investigate the injury and its cause, and to take legal action within the time prescribed." *Id.* at 980. The court also noted this was not normal incompetence or insanity but rather government-induced incompetence. *Id.*

<sup>284</sup>The court determined this would only occur in the rare situation where the alleged negligence itself prevented the claimant from learning the government injured him. Nongovernment-caused incompetence would not prevent the running of the statute of limitations. *Id.*

The Ninth Circuit cited *Clifford* in *Washington v. United States*,<sup>285</sup> in which it allowed a wrongful death action by the survivors of a woman who died after fourteen years in a coma. New York state law, the applicable law in the case, required that a decedent have a valid personal injury action at the time of death in order for the survivor to bring a wrongful death action.

The court held the cause of action did not accrue until Mrs. Washington died, because she was never aware of her injury or its cause.<sup>286</sup> The court also noted that her husband's knowledge was irrelevant. Although he could have requested the appointment of a guardian, he was not required to do so. Therefore, no one had a legal duty to file an action in her behalf.<sup>287</sup> The court reasoned that it was possible she could have recovered before she died and filed the claim herself.

The court also noted the statute of limitations was not tolled; rather, based on *Kubrick*, the claim did not accrue until Mrs. Washington died.<sup>288</sup>

The courts' holdings are correct under the *Kubrick* analysis. The plaintiffs did not know they had been injured, nor did they know the cause of their injury. *Kubrick's* accrual standard requires knowledge of both of those factors. In a situation where the government caused the incompetence that prevented a plaintiff from knowing the critical facts required for claim accrual, the plaintiff is truly blamelessly ignorant. *Kubrick's* goal was to encourage prompt presentation of claims after fair notice of an injury and its cause. The *Kubrick* Court stated a plaintiff could inquire as to the validity of his cause of action and then determine whether to file a claim. If the government rendered the plaintiff incompetent, the plaintiff could not make the required inquiry. Therefore, the claim should not accrue.

## ***B. CONCEALMENT OF GOVERNMENT CONDUCT***

In situations where the government concealed its part in causing the injury, the courts allow deferral of the accrual of the claim. In *Liuzzo v. United States*,<sup>289</sup> the District Court for the Eastern District of Michigan considered the timeliness of a claim against the Federal

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<sup>285</sup> 769 F.2d 1436 (9th Cir. 1985).

<sup>286</sup> *Id.* at 1439.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*; cf. *Dundon v. United States*, 559 F. Supp. 469, 474 (E.D.N.Y.1983) (government-caused incompetence after claim accrual tolled statute of limitations because incompetent claimant incapable of pursuing remedy for the injury).

<sup>289</sup> 485 F. Supp. 1274 (E.D. Mich. 1980).



Bureau of Investigation (FBI). The children of a murdered civil rights worker filed the claim twelve years after the murder.

In 1965, Viola Liuzzo participated in a voting rights march in Alabama. After the march, Ku Klux Klan members shot and killed her as she drove toward Montgomery. The Klansmen, who were also in a car, fired into Mrs. Liuzzo's car after pulling alongside.

One of the Klansmen was an FBI informant who gave the FBI the names of the individuals involved in the killing. President Johnson announced the names of the killers the day after the shooting and commended the FBI. All three Klansmen involved were tried and convicted of the federal charges of conspiring to violate Mrs. Liuzzo's rights.

During the trials, defense attorneys cross examined the informant about his involvement in violence against civil rights personnel, the information he gave the FBI, and threats he made on the night of the murders. He denied all allegations but disclosed that he received expense money and payment for information he gave.

Ten years later, congressional investigators questioned the informant about his activities and the FBI's knowledge of activities related to violence against civil rights movement personnel. He related that he had given the FBI a substantial amount of information in advance of Klan action but that the FBI usually failed to act on it. He also admitted he participated in violence against civil rights personnel with the knowledge of the FBI agent who supervised him. The informant also acknowledged that on the morning of the murder, Klansmen told him that he was going to be given the opportunity to perform the greatest deed of his life for the Klan. He said he told his FBI supervisor this information before he left with the other Klansmen for the shooting.

In this case, the government argued that the claim accrued in 1965, when the plaintiffs discovered that their mother had been murdered. Plaintiffs argued that the claim did not accrue until 1975, when evidence established the FBI's involvement in their mother's death.

The court reviewed the purpose of statutes of limitations and the *Kubrick* decision. It first determined the scope of *Kubrick*, deciding it should not be restricted to medical malpractice cases.<sup>290</sup> Next, it examined the scope of the term "cause" in the *Kubrick* accrual formula. The court analyzed cause as composed of both a "who" and a "what" element.<sup>291</sup> The court reasoned that, if the purpose of section

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<sup>290</sup>*Id.* at 1281.

<sup>291</sup>*Id.* at 1281-82.

2401(b) was to require a plaintiff to promptly investigate the possibility of a claim against the government, the plaintiff needed to know that the government was a potential defendant before the claim accrued. The court decided that knowledge of the “who” component, that is, the government cause of the injury, could in certain circumstances, be as important as the “what” element of causation.<sup>292</sup>

The court applied the standard to the facts before it and reasoned that in 1965 the plaintiffs had no reason to investigate the government’s involvement in their mother’s death. The FBI informant’s testimony was not contradicted and all other factors available indicated those responsible for the murder were apprehended and convicted. It was not until 1975 that the plaintiffs knew enough to ask about the government’s responsibility for their mother’s death. The informant’s new story in 1975 provided the first evidence of government involvement.

The court distinguished those cases that did not require knowledge of the “who” element to begin accrual as cases where the tortfeasor was known. The only missing element was the tortfeasor’s “legal” identity, or whether any other entity was vicariously liable for his acts.<sup>293</sup> The *Liuzzo* plaintiffs did not know the identity of a potential tortfeasor, the FBI. The court reasoned that it would be unreasonable to expect the plaintiffs to investigate the agency given credit for identifying the murderers merely because one of its informants witnessed the murder.

A similar result was reached in *Barrett v. United States*,<sup>294</sup> where the Second Circuit reviewed a claim based on the death of an individual who received chemicals as part of an Army chemical warfare experiment. The victim’s daughter discovered the experiment when the Secretary of the Army released information twenty-two years after her father’s death. She filed a claim that alleged negligence in the creation and administration of the program and a conspiracy to cover up the facts surrounding her father’s death.

At the time of the chemical warfare experiment, the plaintiff’s father accepted voluntary treatment at the New York State Psychiatric Institute. The Psychiatric Institute did not tell him of his participation in the chemical warfare experiment. The Army classified the details of the chemical administered and attempted to create the false impression that a therapeutic drug was administered. Additionally, the government threatened individuals with prosecution un-

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<sup>292</sup>*Id.*

<sup>293</sup>*Id.* at 1283.

<sup>294</sup>689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S.1131 (1983).

der the Espionage Act if they testified or disclosed information about the program.

The plaintiff's father received an injection of a mescaline derivative and died. At the time of his death, officials misled the plaintiff to believe the injection was not the sole cause of her father's death. She filed a suit against the State of New York and ultimately settled her claims. Unbeknownst to plaintiff, the United States Government paid half of the settlement on condition its identity and reason for supplying the drug was kept secret. Finally, when the information was released, the plaintiff learned that her father died solely as a result of the drug. She also learned of the chemical warfare experiment and the government coverup.

The court determined the *Kubrick* "diligent discovery" rule should apply in any situation in which the government deliberately concealed material facts relating to its wrongdoing. This application deferred the running of the statute until the "plaintiff discovers, or by reasonable diligence should have discovered, the basis of the law-

The court concluded that the plaintiff was misled about the type of drug or chemical administered, the purpose of its administration, the source of the drug, and the government's involvement in the administration of the drug. The court said these factors were material facts and that the *Kubrick* rule, rather than the usual rule of accrual at injury, should apply.<sup>296</sup> Although the plaintiff knew her father died because of a drug administered while he was in the Psychiatric Institute, she did not know or have an opportunity to know the "what" or the "who" component of the cause of the injury."

The court explained that although the "who" element is not usually required to start the accrual of an action,<sup>298</sup> where the government concealed its involvement, lack of knowledge of this element will prevent accrual of the claim.

Unless the United States itself concealed the tortfeasor's identity, or the tortfeasor acted within the scope of his federal employment to conceal his identity, any misrepresentation will not be imputed to the government. This situation occurred in *Diminnie v. United States*.<sup>299</sup> In *Diminnie*, a court erroneously convicted the plaintiff of sending

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<sup>295</sup> *Id.* at 327 (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977)).

<sup>296</sup> *Id.* at 328.

<sup>297</sup> *Id.* at 330.

<sup>298</sup> This is because, with knowledge of the "cause" element, the plaintiff can discover the "who" element through the exercise of reasonable diligence. *Id.*

<sup>299</sup> 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984).

extortion letters to the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). Before Diminnie was sentenced, the actual perpetrator, an ATF agent, confessed. After investigators corroborated the confession, Diminnie was released. He argued in his subsequent suit that his claim accrued when he knew the identity of the true culprit, not before.

The court distinguished this situation from the ones in *Barrett* and *Liuzzo*, where the government actively concealed material facts about the cause of the injury. The court decided that the extortionist had been acting outside the scope of his government employment and therefore his conduct was not chargeable to the government.<sup>300</sup> The court held:

[B]efore the accrual of a cause of action against the United States under the FTCA may be deferred because of the plaintiff's inability to identify the party whose conduct triggered the injury, it must be shown that the United States itself played a wrongful role in concealing the culprit's identity.<sup>301</sup>

The results in *Barrett* and *Liuzzo* are consistent with *Kubrick*. A delayed accrual standard had developed to give potential claimants an opportunity to investigate and obtain advice about the validity of their claims before the expiration of the statute of limitations. Failure to defer accrual of a claim when the government actively covers up its involvement as a tortfeasor violates both the intent of Congress and the *Kubrick* principle of protecting a blamelessly ignorant claimant.

Congress decided the United States should be subject to claims for some torts. The FTCA reflects this decision. Government agency action that conceals government involvement in torts runs contrary to that congressional determination. A claimant cannot file a claim if he is unaware the government caused his injury. The courts that deferred accrual of a claim until a claimant is aware of government involvement when the government concealed that information, correctly applied *Kubrick*. At the point the plaintiff knows the fact and cause of his injury, he is in a similar position to other plaintiffs.<sup>302</sup>

## XII. CONCLUSION

The *Kubrick* accrual standard did not find its origin in a medical malpractice case. The standard evolved from the *Urie* discovery doc-

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<sup>300</sup>*Id.* at 305.

<sup>301</sup>The court reasoned that it made little sense to hold a party responsible for misrepresentation if that party did not cause the misrepresentation. *Id.*

<sup>302</sup>*Id.* at 124.

trine. *Kubrick* balanced the recovery-oriented discovery doctrine against the potential denial of recovery caused by a statute of limitations, the FTCA's section 2401(b). The *Kubrick* decision marked the outer limits of the *Urie* discovery doctrine in the context of a medical malpractice case. The Court did not say that the *Kubrick* accrual standard was restricted to medical malpractice cases. It should not therefore be restricted to that type of case, as some courts have done.

The standard should be applied whenever a plaintiff is unable to present a claim at the time injury is inflicted because he is unaware of the injury or its cause. When the standard is applied, it should excuse only ignorance that is truly blameless rather than ignorance caused by a claimant's failure to ask if he has a valid cause of action. Some courts are reluctant to properly apply the *Kubrick* claim accrual standard to a situation in which an otherwise deserving claimant may be denied a possible recovery because he did not know that his claim accrued. These courts must recognize that *Kubrick* intended to bar an otherwise valid claim simply because the claimant did not discover he had been the victim of negligence and file a claim within the statutory period. Once a claimant is aware of the fact and cause of his injury, he must determine whether negligence was involved and decide whether to file the claim, all within the limitations period. The test the courts should use is not only what the claimant knew, but also what the claimant should have known.

When the standard is applied, the objective component must be truly objective. A claimant who has been erroneously advised about the cause of his injury or about whether he was negligently injured will not be allowed to file a late claim because of that advice. The standard requires an evaluation of what the claimant would have known had he been properly advised. Where a claimant is unfortunate enough to receive erroneous advice, the standard does not provide relief and courts should not give it.

On the other hand, deferral of accrual of a claim may be appropriate where government conduct impeded a claimant's investigation into his cause of action. Congress decided to waive the sovereign immunity of the United States for a two-year period. Courts have extended this period if agents of the United States negligently or deliberately concealed important facts from a claimant who inquired about the cause of his injury. These decisions are correct because they protect a blamelessly ignorant claimant who, but for government misconduct, could have filed a timely claim. This extension of, or exception to, the *Kubrick* accrual standard must be applied carefully to ensure that a claimant who merely launches a late inquiry into the possibility of filing a claim is not given extra time. Courts must allow the govern-

ment a reasonable time to process a request for records or other information. A claimant who waits too long to submit a request for records is not blamelessly ignorant and should not be protected from the two-year statute of limitations.

Finally, the standard should not be read as inflexible and requiring inquiry only as to whether negligence caused the injury. Particularly in the failure to diagnose and treat area, it may not be possible to distinguish between inquiry into causation and inquiry into negligence. The thrust of the *Kubrick* decision was to require reasonable effort by a claimant to determine whether to file a claim. The standard should not be applied mechanically to fact settings that result in protecting more than just blameless ignorance. Where a reasonable claimant would inquire, inquiry should be required into either causation or the fact of injury.

Courts must not use an unreasonably high standard for triggering the duty of inquiry. Courts that require inquiry only where there are suspicious circumstances that give notice of possible negligence could defer claim accrual indefinitely and expose the government to claims long after the disappearance of witnesses or relevant records. As long as there is notice of a potential cause or that a condition may constitute an injury, inquiry must be required. The concept of protecting only blameless ignorance requires this.



# RECENT REFORMS IN DIVORCE TAXATION: FOR BETTER OR FOR WORSE?

by Major Bernard P. Ingold\*

## I. INTRODUCTION

By 1984, the tax rules taking effect upon a divorce or separation had become complex, inflexible, and harsh.<sup>1</sup> The rules often worked to frustrate tax-planning goals, produced inequitable results,<sup>2</sup> and, in some instances, were exceedingly burdensome for the Internal Revenue Service to administer.<sup>3</sup>

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<sup>1</sup>For a detailed discussion of the problems in the area of domestic relations taxation prior to 1984, see Lepow, *Tax Policy for Lovers and Cynics: How Divorce Settlement Became the Last Tax Shelter in America*, 62 Notre Dame L. Rev. 32 (1986); Biblin, *Divorce Taxes and Community Property: Some Current Cases, Problems, and Concerns*, 30 U.S.C. Tax Inst. 571 (1978); Randall, *The Domestic Relations Tax Reform Act of 1983: New Rules, But Simple*, 19 Gonzaga L. Rev. 69 (1983-1984); Committee on Domestic Relations Tax Problems, *Legislative Recommendations*, A.B.A. Section Taxation Bull., July 1966.

<sup>2</sup>For example, under the rules in effect prior to 1984, the tax consequences of the transfer of marital property upon divorce was generally decided on the basis of state property laws. In common law states, a divorcing taxpayer was required to recognize taxable gain when transferring appreciated property to a spouse. This rule was based on *United States v. Davis*, 370 U.S. 65 (1962). In community property jurisdictions, divisions of community property were treated as non-taxable partitions. Rev. Rul. 81-292, 1981-2 C.B. 158. See Lepow, *supra* note 1, at 37.

<sup>3</sup>The rules relating to entitlement to exemption for the children of divorced parents were especially difficult to monitor. Under pre-1984 law, a noncustodial parent could claim an exemption for a child if the parent furnished more than \$1200.00 in support for the child, unless the custodial parent could establish that he or she provided more. I.R.C. § 152(e)(2)(A) (1982). The Internal Revenue Service (IRS) was often required to settle disputes between divorced spouses over who provided more support for a child during the tax year.



In 1984, Congress responded to the growing criticism over the divorce tax rules by enacting the Domestic Relations Tax Reform Act.<sup>4</sup> Among other changes, the Act revised the definition of alimony, eliminated the harsh rule that transfers incident to divorce are taxable, and simplified the rules regarding the entitlement to a personal exemption for children of divorced parents.<sup>5</sup>

Although the 1984 Act accomplished much needed reform, it left some problems unresolved and, in a few instances, created new ones.<sup>6</sup> Congress addressed several of these problems in the sweeping 1986 Tax Reform Act.<sup>7</sup> This act amends the tax code to revise the recapture rules for front loading of alimony<sup>8</sup> and modifies the requirements to make qualifying alimony payments.<sup>9</sup>

This article analyzes the recent changes in tax rules regarding alimony, child support, property settlement, and entitlement to dependency exemptions. It offers suggestions for minimizing tax burdens upon divorce or separation, highlights issues calling for careful tax planning, and comments on those areas of domestic relations taxation still in need of a legislative reform.

<sup>4</sup>The Domestic Relations Tax Act is Subtitle B of the Deficit Reduction Act of 1984. Pub. L. No. 98-369, §§ 421-426, 98 Stat. 494, 793-805 [hereinafter 1984 Act]. (codified at 26 U.S.C.). See generally H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. (1984), reprinted in *The Tax Reform Act of 1984*, Law and Controlling Committee Reports 65, 195, 336, 447 (CCH 1984).

<sup>5</sup>For an excellent overview of the act see O'Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 Fam. L. Q. 473 (1985). There are a number of good articles offering planning suggestions for the tax practitioner in light of the 1984 Act. See, e.g., McCaffrey, *Income Tax Planning for Divorce and Separation After TRA '84*, 123 Trusts and Est. 40 (Sept. 1984); Mulliken, *The Tax Reform Act of 1984 and Divorce Taxation*, The Army Lawyer, Oct. 1984, at 16; Taggart, *Economic Consequences of Emotional Choices: Divorce and Separation Under TRA '84*, 15 Cumb. L. Rev. 341 (1984); see also Comment, *The Effect of the Tax Reform Act of 1984 on Alimony and Transfers of Property Incident to Divorce*, 19 U. Richmond L. Rev. 129 (Fall 1984).

<sup>6</sup>Probably the most criticized rule in the 1984 Act was the recapture of front loading of alimony provisions. See *infra* notes 55-60 and accompanying text. For a discussion of the problems remaining after the 1984 Act, see Randall, *Practical Applications of the 1984 Domestic Relations Tax Bill - Trick or Treat*, 38 U.S.C. Tax Inst. 10-1 (1985) and Asimow, *Deducting Alimony and Child Support and Avoiding Recapture Under the DRA*, 63 J. Taxation 150 (1985).

<sup>7</sup>The 1986 Tax Reform Act. Pub. L. No. 99-514, 100 Stat. 2085 (1986) [hereinafter 1986 Act]; H.R. 3838, 98th Cong. 2d Sess. (1986). An article discussing the impact of the 1986 Act on domestic relations taxation in Asimow, *Alimony and Marital Property Divisions under the 1986 Act*, Taxes, June 1987, at 352.

<sup>8</sup>I.R.C. § 71(f)(2) (1982 & Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(c)(3).

<sup>9</sup>I.R.C. § 71(b)(1)(D) (1982 & Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(b).

## 11. ALIMONY AND SPOUSAL SUPPORT

### A. GENERAL REQUIREMENTS

Most practitioners are familiar with the general rule that alimony or spousal support payments are deductible by the payor and includible in the payee's gross income.<sup>10</sup> Although this rule has been a part of the Code since 1942,<sup>11</sup> Congress has struggled through the years to clearly define the types of payments that should qualify for the alimony deduction.<sup>12</sup>

The Domestic Relations Tax Reform Act of 1984 retained the general rule that alimony is deductible, but, in an effort to establish a more uniform and objective standard, made significant modifications to the definition of alimony and separate maintenance.<sup>13</sup> To fall within the new definition of alimony or separate maintenance, the payments

<sup>10</sup>I.R.C. § 62(a)(10), 71 (West Supp. 1987). Section 215 of the Code allows the payor of alimony a deduction in computing gross income.

"In 1942, Congress reversed a longstanding tax policy and allowed an exception to the rule prohibiting transfers from higher bracket taxpayers to lower bracket taxpayers by making alimony deductible by the payor and includable in the payee's gross income. Revenue Act of 1942, 56 Stat. 798 (codified as I.R.C. §§ 22K, 23U (1942), *superseded* by I.R.C. §§ 71, 215 (1982)).

<sup>12</sup>For a discussion of the development of the alimony deduction see Taggart & O'Connell, *Divorce Taxation*, 5 Fam. Advoc. 19 (1982), and Taft, *Tax Aspects of Divorce and Separation*, 190 N.Y.L.J. 1 (1983).

<sup>13</sup>1984 Act, *supra* note 4, § 422(a) (amending I.R.C. § 71(b)). Section 71 of the Code provides:

(b) Alimony or Separate Maintenance Payments Defined.— For purposes of this section—

(1) In General.— The term "alimony or separate maintenance payment" means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse (and the divorce or separation instrument states that there is no such liability).

(2) Divorce or separation instrument.— The term "divorce or separation instrument" means—

must meet certain criteria. First, the payments must be in cash.<sup>14</sup> Second, the payments must be received by or on behalf of a spouse under a divorce or separation instrument.<sup>15</sup> Third, the instrument must not designate that the payments are not alimony.<sup>16</sup> Fourth, the payments must not be to a member of the same household if they are made under a final decree of divorce or separate maintenance.<sup>17</sup> Finally, there must be no liability to make the payments after the death of the payee spouse.<sup>18</sup>

The 1984 Act also contained a requirement that the divorce or separation instrument specifically state that the liability to make payments ceases upon death.<sup>19</sup> Congress eliminated this requirement in the 1986 Tax Reform Act, so that now state law can rescue poorly drafted agreements.<sup>20</sup> The requirement that there be no liability to make payments after the payee spouse dies remains, however.<sup>21</sup> Therefore, it is always advisable to include language to this effect in separation agreements, despite the 1986 change, because payments could be characterized as child support if state law does not otherwise provide that alimony payments cease upon death of the payee spouse.

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

I.R.C. § 71 (WestSupp. 1987). The former section 71 set forth three basic requirements: first, the alimony payments had to be periodic; second, the payments had to be made in discharge of a legal obligation imposed by state law on account of the family marriage relationship; third, the payments had to be made pursuant to a decree of divorce or separate maintenance, a written separation agreement, or a decree for support. *See generally*, Mertins, *Law of Federal Income Taxation* § 31A, 4 (1985).

<sup>14</sup>1984 Act, *supra* note 4, § 422(a). A payment can be made by check or money order payable on demand. Treas. Temp. Reg. § 1.71-1T (Q and A 5) (1984).

<sup>15</sup>1984 Act, *supra* note 4, § 422(a).

<sup>16</sup>*Id.* This provision is significant because it gives the parties flexibility to designate what would otherwise be alimony as nondeductible support payments.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* This has been called the "malpractice provision" because the failure to include language in the instrument that payments cease upon death exposes a lawyer to potential malpractice claims. *See* Randall, *supra* note 6.

<sup>20</sup>1986 Act, *supra* note 7, § 1843(b). This amendment is retroactive for divorce and separation agreements executed after 1984. 1986 Act, *supra* note 7, § 1881. *See* Lepow, *Nobody Gets Married for the First Time Anymore - A Primer on the Tax Implications of Support Payments in Divorce*, 25 Duq. L. Rev. 43 (1986).

<sup>21</sup>The Research Institute of America, Inc., The RIA Complete Analysis of the '86 Tax Reform Act, ¶ 333, at 92-93 (1986). A related rule is that there be no substitute for alimony payments upon the payee spouse's death.

## ***B. THE DIVORCE OR SEPARATION AGREEMENT***

Under the revised code provision, a qualifying divorce or separation instrument can be any one of the following: “(A) a decree of divorce or separate maintenance or a written instrument incident to such decree, (B) a written separation agreement, or (C) a decree... requiring a spouse to make payments for the support or maintenance of the other spouse.”<sup>22</sup>

The first category generally encompasses spousal support payments made pursuant to divorce decrees. Although this category does not include interlocutory decrees of divorce,<sup>23</sup> payments may qualify as alimony under the remaining two sections if the interlocutory decree is incorporated into a separation agreement or court order.<sup>24</sup> Payments made following an annulment decree qualify as being made following divorce or a decree of support.<sup>25</sup> Under this first category, the parties must not be members of the same household unless one of the parties intends to leave the home and actually departs within one month from the date payment is made.<sup>26</sup>

The second category, section 71(a)(2)(B), includes all written separation agreements whether or not they are incident to a decree of divorce or separate maintenance. An agreement qualifies under this section even though it does not obligate the payor spouse to pay a specific sum to the other spouse.” There is also no requirement for the agreement to state that the parties intend to remain separated permanently.” The 1984 Domestic Relations Tax Reform Act clarifies that the parties need not be living separate and apart when alimony payments are made pursuant to a separation agreement.<sup>29</sup> A written separation agreement will be effective for tax purposes under this

<sup>22</sup> I.R.C. §§ 71(b)(2)(A), (B), and (C) (West Supp. 1987).

<sup>23</sup> Rev. Rul. 87-368, 1987-2 C.B. 896.

<sup>24</sup> *Wright v. Commissioner*, 62 T.C. 377 (1974), *aff'd*, 534 F.2d 593 (7th Cir. 1976).

<sup>25</sup> *Neuburger v. Commissioner*, 61 T.C. 457 (1974).

<sup>26</sup> *Treas. Temp. Reg. § 1.71-1T* (1984) (Q and A 9). Adopted from Committee Report, H.R. Rep. No. 432, 98th Cong. 2d Sess. 1491, 1496 (1984). Some commentators have criticized the requirement that parties live in separate households following a decree of divorce or separate maintenance as imposing too harsh a burden on lower income families. Feinberg & Robinson, *A Household is Not a Home: "Not Members of the Same Household In The Tax Treatment of Alimony Payments*, 6 Va. Tax Rev. 377 (Fall 1986); Schwartz, *Washington v. Commissioner: Separated and Living Apart in Reality But Not in the Eyes of the Tax Court*, 35 Tax L. Rev. 799 (1982).

<sup>27</sup> *Jacklin v. Commissioner*, 79 T.C. 340 (1982).

<sup>28</sup> *Treas. Temp. Reg. § 1.71-1T(b)(2)(i)* (1984).

<sup>29</sup> *Id.* § 1.71-1T(b) (Q and A 9). This modifies the pre-1984 rule, which required separated couples to maintain two households even though they were not divorced.

section even if it is not legally enforceable or grants benefits that could not be obtained under local law.<sup>30</sup> Payments made unilaterally or pursuant to oral agreements, however, do not qualify as alimony under the Code.<sup>31</sup>

The final section, 71(a)(2)(C), includes court orders for support that are not accompanied by a decree of divorce or separate maintenance. Payments made pursuant to interlocutory decrees and temporary court orders qualify under this section even if the parties live in the same household when the payments are made.<sup>32</sup> Just about any order issued by a court, including memorandum orders, will constitute a decree of support under section 71(a)(2)(C).<sup>33</sup> An agreement not to seek a court order so long as the spouse continues to pay alimony is not sufficient, however.<sup>34</sup>

The obligation to make alimony payments must stem from one of the three types of decrees or instruments listed in section 71. Payments will not qualify for the alimony deduction if they are purely voluntary.<sup>35</sup> Thus, payments made before a decree is entered, or before an agreement is signed, will not qualify as alimony even if the parties are separated.<sup>36</sup> Moreover, payments a soldier makes solely to comply with service regulations,<sup>37</sup> and not otherwise required under a qualifying decree or agreement, will not constitute alimony. Soldiers making these payments should enter into a separation agreement with their spouses to be entitled to the alimony deduction.

### C. OTHER REQUIREMENTS

Although the new rules simplify the requirements for alimony payments, there are several prerequisites that must be satisfied under

<sup>30</sup>*Id.*; Taylor v. Campbell, 335 F.2d 841 (5th Cir. 1964).

<sup>31</sup>Clark v. Commissioner, 40 T.C. 57 (1963); Herring v. Commissioner, 66 T.C. 308 (1976), *acq.*, 1976-2 C.B. 2. Letters from an attorney embodying an informal agreement do not suffice. Garner v. Commissioner, T.C. Memo 1973-79; Rev. Rul. 59-266, 1959-2 C.B. 377. Agreements made and recorded in open court, however, have been considered sufficient. Prince v. Commissioner, 66 T.C. 1058 (1976).

<sup>32</sup>Treas. Temp. Reg. § 1.71-1T (1984) (Q and A 9); Treas. Reg. § 1.71-1(b)(3)(i) (1984).

<sup>33</sup>Taylor v. United States, 55 T.C. 1134 (1971). Note, however, that the Code contemplates a decree issued by a court of civil jurisdiction, not an ecclesiastical court. Clark v. Commissioner, 40 T.C. 57 (1963).

<sup>34</sup>Kantor v. United States, T.C. Memo 1965-234; Shapiro v. United States, T.C. Memo 1979-427.

<sup>35</sup>Herman v. Commissioner, T.C. Memo 1964-61; Elicker v. United States, T.C. Memo 1973-91.

<sup>36</sup>Moore v. United States, 449 F. Supp. 163 (N.D. Tex. 1978); *accord* Commissioner v. DeWitt, 277 F.2d 720 (2d Cir. 1960); Serrel v. Commissioner, T.C. Memo 1965-232.

<sup>37</sup>For example, Dep't of Army, Reg. No. 608-99, Family Support, Child Custody, and Paternity (22 May 1987, Update 2) requires soldiers to provide adequate and continuous support for dependents. In the absence of a court order or separation agreement, soldiers must provide support in the amount of their Basic Allowance for Quarters (BAQ) at the with-dependent rate.

the revised definition. One of the most significant is that the alimony payments must actually be made from the payor spouse's funds.<sup>38</sup> Thus, for example, an alimony deduction is not available for a spouse who allows his wife to occupy his home rent free.<sup>39</sup> Similarly, transfers of services or property, or the execution of a debt instrument, will not qualify for the alimony deduction because they are not equivalent to a cash transfer.<sup>40</sup>

Another related requirement is that an alimony deduction is available only to the obligor spouse.<sup>41</sup> Thus, an estate, trust, or third party making payments for spousal support will not be entitled to an alimony deduction.<sup>42</sup>

Finally, the parties cannot file joint tax returns and claim a deduction for alimony payments.<sup>43</sup>

### ***D. SPECIAL FEATURES OF THE NEW RULE***

The new rules give divorcing spouses greater flexibility to take advantage of the alimony deduction. Under the new law, the payor may deduct payments made to third parties "on behalf of the former spouse" and pursuant to the terms of the divorce decree or separation agreement.<sup>44</sup> If the divorce or separation instrument does not provide for payment to the third party, the payee spouse must send a written request, consent, or ratification to the payor spouse, authorizing the third party payment.<sup>45</sup> Moreover, the third party payments must actually benefit the spouse. Thus, if the payments increase a payor spouse's basis in property owned by him or satisfies his own legal obligations, the sums paid will not be treated as alimony.<sup>46</sup>

Another feature of the new law is that payments need only be made "on behalf of a spouse" and need not be for support.<sup>47</sup> Qualifying

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<sup>38</sup>Treas. Temp. Reg. § 1.71-1T(b) (1984)(Q and A 5).

<sup>39</sup>*Id.*; see also *Pappenheimer v. Allen*, 164 F.2d 428 (5th Cir. 1947); *Bradley v. Commissioner*, 30 T.C. 701 (1958); *Isaacson v. Commissioner*, 58 T.C. 659 (1972), *acq.*, 1973-2 C.B. 2. Rent-free use of property should be distinguished from the actual cash payment of rent, which is deductible. Treas. Temp. Reg. § 1.71-1T(b) (1984) (Q and A 6).

<sup>40</sup>Treas. Temp. Reg. § 1.71-1T(b) (1984)(Q and A 5).

<sup>41</sup>Treas. Reg. § 1.215-1(b) (1984).

<sup>42</sup>*Id.*, see also *Estate of Jarboe v. Commissioner*, 39 T.C. 690 (1963).

<sup>43</sup>I.R.C. § 71(e) (West Supp. 1987). Filing joint tax returns would not realize any tax advantage anyway, because one spouse would merely report as income what the other spouse claimed as deductible alimony.

<sup>44</sup>Treas. Temp. Reg. § 1.71-1T (1984) (Q and A 7).

<sup>45</sup>*Id.* The payor spouse must receive the written notification prior to the date of filing the payor's tax return for the tax year in which the payment was made.

<sup>46</sup>Treas. Temp. Reg. § 1.71-1T(b) (1984) (Q and A 6).

<sup>47</sup>1984 Act, *supra* note 4, § 422(a) (codified as I.R.C. § 71(b)(1)(A)).

payments could include cash payments for rent, tuition, mortgages, and tax liability, if they are made on behalf of the spouse.<sup>48</sup> Attorney fees paid on behalf of the former spouse can also be deducted if paid by the other spouse.<sup>49</sup> Similarly, the payment of a former spouse's medical expenses are deductible if they meet the other statutory requirement. ~. ~.

Settlement agreements and decrees commonly require the working spouse to maintain life insurance coverage as an incident of spousal support. Premiums paid by the payor spouse for term or whole life insurance on his life are deductible if the payee spouse is an irrevocable beneficiary.<sup>51</sup> Premiums are not deductible as alimony if the payor remains the owner of the policy, even if the former spouse, as a beneficiary, receives an indirect benefit.<sup>52</sup>

The new tax laws now also allow the parties to designate in the divorce or separation instrument that support payments are not to be treated as alimony.<sup>53</sup> This permits the parties to characterize payments that in all other respects would be considered alimony as non-deductible by the payor and not includible in the payee's gross income. The option does not, however, work in reverse, so the payments must meet the statutory requirements to be deductible as alimony.

## ***E. FRONT-LOADING AND RECAPTURE RULES***

The 1984 Domestic Relations Tax Reform Act added several new rules designed to deter taxpayers from disguising property settlements as alimony to create disproportionately large deductions in the first years of payment.<sup>54</sup> Under the 1984 Act's "minimum term rule," any payment in excess of \$10,000 per calendar year is deductible only

<sup>48</sup>Treas. Temp. Reg. § 1.71-1T (1984) (Q and A 6). A caveat to this rule, however, is that payments made to maintain property still owned by the payor are not deductible. Also, they must be called for by the divorce instrument or ratified by the payee.

<sup>49</sup>*Id.* This changes prior law. See Rev. Rul. 69-32, 1969-1 C.B. 310. See *infra* section VII, for a discussion of what types of attorney fees are deductible.

<sup>50</sup>Rev. Rul. 62-106, 1962-2 C.B. 21. Further, medical insurance premiums paid by the divorced spouse are deductible as alimony. *Isaacson v. Commissioner*, 58 T.C. 659 (1972), *acq.*, 1973-1 C.B. 1.

<sup>51</sup>Treas. Temp. Reg. § 1.71-1T (1984) (Q and A 6); see also Rev. Rul. 76-218, 1970-1 C.B. 19; *Hyde v. Commissioner*, 301 F.2d 279 (2d Cir. 1962). See generally Froelich, *Tax Aspects of Disposition of Insurance on Divorce and Separation*, 105 *Trusts and Estates* 711 (1966); Wenig, *Use of Life Insurance in Divorce and Separation Agreements*, 28 N.Y.U. Inst. Fed. Tax'n 837 (1970).

<sup>52</sup>Treas. Temp. Reg. § 1.71-1T(b) (1984) (Q and A 6).

<sup>53</sup>1984 Act, *supra* note 4, § 422(a) (codified as I.R.C. § 71(b)(1)(B)); see also Treas. Temp. Reg. § 1.71-1T(b) (1984) (Q and A 8).

<sup>54</sup>I.R.C. § 71(f)(1) (Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(c)(1).

if the separation agreement or court order requires the payor to make alimony payments in at least six "post-separation" years, beginning with the first year of payment.<sup>55</sup> A second rule provided that if payments in any one of the six post-separation years decrease by more than \$10,000 from the payment in a prior year, the payor spouse must "recapture" the excess payment as ordinary income in the following year.<sup>56</sup>

Divorce tax commentators strongly criticized the alimony recapture rules established in the 1984 Act.<sup>57</sup> In response to these criticisms, the 1986 Tax Reform Act repealed the six year "minimum term rule" and substantially revised the front loading recapture rules by reducing the recapture period from six to three years and by increasing the differential amount to \$15,000.<sup>58</sup> Under the recodification, if the total alimony payments in post-separation year one exceeds the average annual payments in years two and three by more than \$15,000, the excess amount is recaptured in the payor's gross income in the third year.<sup>59</sup> Recapture of payments also occurs to the extent total payments in the second year exceed payments made during the third year by more than \$15,000. The recipient will be entitled to deduct the amount recaptured in his or her third post-separation taxable year.<sup>60</sup> The recapture rules do not apply if either spouse dies before the close of the third year or if the payee spouse remarries before the third post-separation year.<sup>61</sup> Recapture rules also do not apply to

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<sup>55</sup>I.R.C. § 71(G) (Supp. III 1985); Treas. Temp. Reg. § 1.71-1T(d) (1984) (Q and A 23).

<sup>56</sup>I.R.C. § 71(G) (Supp. III 1985); Treas. Temp. Reg. § 1.71-1T(d) (1984) (Q and A 24, 25).

<sup>57</sup>See Hjorth, *Divorce, Taxes, and Recent Tax Reforms*, 61 Wash. L. Rev. 150 (1986); see also Randall, *supra* note 6. Professor Randall writes that the recapture rules are "arbitrary and unreasonable."

<sup>58</sup>I.R.C. § 71(F) (Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(c)(1).

<sup>59</sup>*Id.* An example will illustrate how the two recapture rules work. Assume the payor, Jim Doe, makes alimony payments of \$60,000 in the first post-separation year, \$25,000 the second year, and \$5,000 in the third year. The payments made in years one and two are deductible in full by Jim Doe and includible in his ex-wife's gross income. Mr. Doe must, however, recapture \$5,000 in year three for the second year. This is the sum by which payments in the second year (\$25,000) exceed payment in the third year (\$5,000) by more than \$15,000. The recapture amount for the payments in the first year is \$32,500. This is the amount by which payments in the first year exceed the average of payments in years two and three by more than \$15,000. When making the determination, only \$20,000 is treated as being paid in year two because the average of payments in the second and third year does not include the \$5,000 payment made in the second year that has been recaptured in the third year. For a comprehensive discussion of the 1987 recapture rules see McLachin and Hopkins, *The New Alimony Tax Rules*, Fairshare, The Matrimonial Monthly 11, 21 (November 1986), and O'Connell, *Divorce After the Act*, 126 Trusts and Est. 44 (June 1987).

<sup>60</sup>Treas. Temp. Reg. § 1.71-1T(d) (1984) (Q and A 24).

<sup>61</sup>I.R.C. § 71(F)(5) (Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(c)(1).



payments that fluctuate as a result of continuing liability to pay a fixed part of business earnings.<sup>62</sup>

The revised recapture rules are effective for divorce and separation agreements executed after December 31, 1986.<sup>63</sup> The new rules may apply to pre-1987 instruments modified after January 1, 1987 if the modification instrument provides that the new recapture rules apply.<sup>64</sup>

Despite the recent revisions, the recapture rules remain quite complex and could work disastrous consequences for the unwary. The rules make it more difficult to structure rehabilitative alimony schedules where initially large sums are needed to train or educate a non-working spouse. Moreover, because the rules are triggered by payments made and not amounts payable, they could come into play when large amounts of arrearages are paid.<sup>65</sup>

If Congress intended to simplify the rules relating to front loading of alimony in 1986, they failed miserably. The new rules are difficult to comprehend, easy to circumvent,<sup>66</sup> and do not appear to serve an objective worth all of the effort. Congress should consider repealing, or at least simplifying, these unnecessarily complex and restrictive recapture rules.

## ***F. SPECIAL REPORTING REQUIREMENTS***

To make monitoring alimony payments easier, the new law requires individuals receiving alimony to furnish their taxpayer identification number to the payor spouse who, in turn, must furnish the number on his or her income tax return.<sup>67</sup> If the payee fails to furnish the

<sup>62</sup>Treas. Temp. Reg. § 1.71-1T(d) (1984) (Q and A 25).

<sup>63</sup>I.R.C. § 71(F)(5) (Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843.

<sup>64</sup>I.R.C. § 71(F)(5) (Supp. III 1985), as amended by 1986 Act, *supra* note 7, § 1843(c)(2). A good article for practitioners seeking to amend pre-1987 instruments to comply with the new rules is *Modification of Pre-1987 Divorce Instruments*, 7 Fairshare 10 (Oct. 1987).

<sup>65</sup>An excellent article discussing potential problems with the recapture rules is Taggart, *Economic Consequences of Emotional Choices: Divorce and Separation After the Tax Reform Act of 1984*, 15 Cumb. L. Rev. 341-70 (1985); see also Behr, *Tax Planning in Divorce: Both Spouses Benefit From the Tax Reform Act of 1984*, 21 Willamette L. Rev. 767 (Fall 1985).

<sup>66</sup>For example, one way an attorney can circumvent the recapture rules is to manipulate the time periods for making payments. The recapture rules can be avoided merely by splitting excessive payments to fall on December 31 and January 1 of successive years.

<sup>67</sup>I.R.C. § 215 (Supp. III 1985); see Treas. Temp. Reg. § 1.215-1T (1984) (Q and A 1). The IRS is running a compliance program under which it will match deductions claimed by alimony payors against amounts reported by payees. This pilot program will examine all taxpayers who claimed an alimony deduction or reported alimony income on their 1985 tax returns. Internal Revenue Manual transmittal 4(13)00-114 (Oct. 20, 1987).

number to the payer, or the payor spouse fails to report the number to the service, they may incur a fifty-dollar penalty.<sup>68</sup>

## 111. CHILD SUPPORT

### A. GENERAL

The 1984 Domestic Relations Tax Reform Act retained the general rule that payments made for the support of children of divorced parents are not deductible by the payor nor includible in the income of the payee.<sup>69</sup> The Act, however, greatly increases the class of support payments qualifying as child support.

Prior to 1984, undifferentiated payments providing for the support of both spouse and children were treated as alimony, even if the sums due were reduced on a contingency related to the child, such as the child's marriage, or attainment of the age of majority.<sup>70</sup> The 1984 Act provides that any amounts specified in an agreement to be reduced on the happening of a contingency relating to a child will be treated as being "fixed" for support of the child.<sup>71</sup> The new code section lists attaining a specified age, marrying, dying, and leaving school as examples of contingencies that will characterize payments as fixed for child support.<sup>72</sup>

### B. THE "CLEARLY ASSOCIATED" TEST

To prevent circumvention of the rule, the section also applies to payments that will be reduced at a time that can be "clearly associ-

<sup>68</sup>I.R.C. § 6676(c) (Supp. III 1985).

<sup>69</sup>I.R.C. § 71(c) (Supp. III 1985) (replacing former § 71(b)). This section provides that payments received to support children are to be included in the gross income of the payor. *See also* I.R.C. I 215 (Supp. III 1985), which provides that sums paid for support of a child are not deductible by payor spouse.

"This rule was based on the Supreme Court decision in *Lester v. Commissioner*, 366 U.S. 299 (1961). In *Lester*, the Court held that support payments would not be treated as child support payments for tax purposes unless they were specifically designated as such in the divorce decree or separation instrument.

<sup>71</sup>I.R.C. § 71(c)(2) (Supp. III 1985). This revised section provides:

(2) Treatment of certain reductions related to contingencies involving child.—For purposes of paragraph (1), if any amount specified in the instrument will be reduced—

(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in paragraph (1),

an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

<sup>72</sup>*Id.*; *see also* Treas. Temp. Reg. I 1.71-1T(c) (1984) (Q and A 17).

ated" with a contingency related to a child.<sup>73</sup> Guidance on the parameters of the "closely associated" test has been provided in proposed temporary regulations. Under these regulations, payments will be presumed to be "clearly associated" under two circumstances. First, if the payments are to be reduced within six months before or after the child attains eighteen, twenty-one, or the local age of majority.<sup>74</sup> Second, if the payments are to be reduced two or more times "which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive."<sup>75</sup> Unless the taxpayer can rebut the presumption in these two situations, the payments will be treated as fixed for support of the child and they will not qualify as alimony payments.<sup>76</sup> Extreme care must therefore be utilized in drafting agreements calling for alimony when the receiving spouse has custody of children.

Notably, the payment reduction provisions will apply not only to lump sum payments for support of the former spouse and child, but also to payments for support of the spouse that nevertheless are to be reduced, pursuant to the terms of the agreement, upon a contingency related to a child.<sup>77</sup> On the other hand, an amount must still be "fixed," or determinative in some way, to qualify for the child support exclusion.<sup>78</sup> Thus, payments made under an instrument merely calling for support of "wife and child," and not required to be reduced under any contingency related to the child, will still be treated as alimony for tax purposes.

The new rules relating to taxation of child support payments have received a cold reception from the divorce bar.<sup>79</sup> The biggest complaint

<sup>73</sup> I.R.C. § 71(c)(2)(B) (Supp. III 1985).

<sup>74</sup> Treas. Temp. Reg. § 1.71-1T(1984) (Q and A 18).

<sup>75</sup> *Id.* This provision of the temporary regulation has been criticized as being "unintelligible." See Hjorth, *Divorce, Taxes, and the 1984 Tax Reform Act: An Inadequate Response to an Old Problem*, 61 Wash. L. Rev. 150, 171 (1986); see also Wicker, *Temporary and Proposed Regulations Respecting Alimony and Interspousal Transfers - Regs., §§ 1.71-1T and 1.1041-1T*, 26 Tax Management Memo 19 (Sept. 1985).

<sup>76</sup> The presumption can be rebutted by showing that the payments are to be reduced at a time determined independently of a contingency relating to a child. Treas. Temp. Reg. § 1.71-1T(c) (1984) (Q and A 18).

<sup>77</sup> For example, assume that a 40-year-old wife retains custody of a son who is 10 years old at the time of the divorce. Assume further that the divorce instrument calls for support payments of \$600/month to the ex-wife, to be reduced to \$300/month when she attains the age of 48. Because this reduction occurs at a time clearly associated with a contingency related to a child, i.e., the child attaining the age of 18, \$300/month must be treated as child support. See also the example in Treas. Temp. Reg. § 1.71-1T(c) (1984) (Q and A 18) and the examples in O'Connell, *Divorce After the Act*, 126 Trust and Est. 44 (June 1987).

<sup>78</sup> See Treas. Temp. Reg. § 1.71-1T(c) (1984) (Q and A 15).

<sup>79</sup> See, e.g., DuCanto, *The Strange and Untimely Death of Lester*, 63 Taxes Jan. 1985, at 9; Hjorth, *Divorce, Taxes, and Recent Reforms*, 61 Wash. L. Rev. 150 (1986).

is that the rule restricts a higher bracket taxpayer's ability to shift income to a lower tax bracket spouse. The parties now do not have the freedom to characterize support payments as alimony to reduce tax liability and increase the pool of after-tax dollars available for supporting dependents. Commentators argue that this loss in flexibility does not come with any corresponding benefit because the new rules are unlikely to generate more money for the children of the divorced parents or produce more taxable income."<sup>80</sup> Yet, the rule will undoubtedly produce more litigation as divorce attorneys attempt to circumvent section 71(c). These complaints have merit and Congress should consider amending the hastily promulgated rules to provide more of a tax incentive for supporting children.

### C. SPECIAL CONSIDERATIONS

The 1984 Domestic Relations Tax Reform Act did not change the special rule for characterizing payments made in amounts less than the total amount called for in a decree or agreement for support of both the spouse and child. Pursuant to section 71(c)3, the amounts paid are first treated as nondeductible child support.<sup>81</sup> Consequently, the paying spouse will usually have a tax incentive for keeping payments current and paying arrearages by the end of the tax year. This rule could work a hardship on a payee spouse who must declare as income substantial support arrearages received in a subsequent tax year.

Neither the Code nor the regulations define what constitutes a "minor child" for purposes of child support tax treatment. The Tax Court, however, has applied federal law to conclude that word minor encompasses anyone who has not yet attained the age of twenty-one.<sup>82</sup> Therefore, even if a child of eighteen has reached the age of majority under the state law, he is nevertheless a minor for purposes of section 71(c).<sup>83</sup>

A related issue raised in some cases is whether payments made to support an unadopted child from the prior marriage of the taxpayer's wife qualifies. The Tax Court has ruled that "child" means child of the taxpayer; thus payments for support of an unadopted child do not constitute child support for purposes of section 71(c).<sup>84</sup> Presumably,

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<sup>80</sup>See DuCanto, *supra* note 79; see also Seago and O'Neil, *New Laws Substantially Change Treatment of Alimony and Property Transfers at Divorce*, 61 J. Tax. 20 (1984).

<sup>81</sup>I.R.C. § 71(c)(3) (Supp. III 1985); see also *Smith v. Commissioner*, 51 T.C. 1 (1968), *acq.*, 1969-2 C.B. XXV.

<sup>82</sup>*Commissioner v. Borbonus*, 42 T.C. 983 (1964).

<sup>83</sup>*Id.*

<sup>84</sup>*Faber v. Commissioner*, 264 F.2d 127 (3d Cir. 1959).

payments for support of a foster child, or a child adopted only by the payee spouse also fall outside of the child support provisions in the code.

Another potential problem area in characterizing support payments arises when there are conflicting decrees or agreements.<sup>85</sup> In the case of a separation agreement followed by an inconsistent divorce decree, the issue will usually depend on whether the agreement was merged or survived in the decree.<sup>86</sup> Even if survival is intended, however, the agreement will not always control characterization of the payments for tax purposes in the face of a conflicting decree, particularly if the agreement lacks specificity.<sup>87</sup> If two conflicting decrees are involved, the courts will generally give more weight to the subsequent decree, especially if it represents a modification of the preexisting decree.<sup>88</sup> This rule is not absolute and a court will likely give more weight to a prior consent decree over a subsequent *ex parte* order.<sup>89</sup>

Decrees sometimes fail to specify who payments are intended to support. Under the new rules, these payments will be treated as child support only if the payments are to be reduced on a contingency relating to a child. Silent decrees can be clarified in modification proceedings, but courts will generally not give retroactive effect to a recharacterization.<sup>90</sup>

The best way to avoid these problems is to draft agreements that clearly designate support payments, comply with statutory requirements, and reflect the intent of the parties. Practitioners should thereafter diligently ensure that all subsequent court orders clearly reflect the party's agreement.

## IV. DEPENDENCY EXEMPTION

### A. GENERAL RULE

The 1984 Domestic Relations Tax Reform Act amends section 152 of the Code to simplify treatment of the entitlement to the exemption

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<sup>85</sup> An excellent analysis for determining characterization under these circumstances is contained in Sander and Gutman, *Domestic Relations: Divorce and Separation*, 95-4 Tax Mgmt., at A-26 (B.N.A. 1986).

<sup>86</sup> *Galin v. Commissioner*, T.C. Memo 1973-62.

<sup>87</sup> *Platt v. Commissioner*, T.C. Memo 1985-592; *see also Metcalf v. Commissioner*, 343 F.2d 66 (1st Cir. 1965); *Miller v. Commissioner*, T.C. Memo 1972-9.

<sup>88</sup> *Seiger v. Commissioner*, 51 T.C. 611 (1969), *acq.*, 1971-2 C.B. 3; *Ward v. Commissioner*, T.C. Memo 1979-252 and 1979-358.

<sup>89</sup> *Tinsman v. Commissioner*, 47 T.C. 560 (1967), *acq.*, 1967-2 C.B. 3.

<sup>90</sup> *Graham v. Commissioner*, 79 T.C. 415 (1982); *Johnson v. Commissioner*, 45 T.C. 530 (1965), *acq.*, 1968-2 C.B. 2; *Gordon v. Commissioner*, 70 T.C. 525 (1978).

for children of divorced parents.<sup>91</sup> The new law was designed to remove from the IRS the burden of resolving factual disputes and provide more objective criteria in determining dependency exemption entitlement.<sup>92</sup>

Generally, under amended section 152, the parent having custody of a child for the greater part of the tax year is entitled to claim the exemption for the child.<sup>93</sup> The custodial parent must, however, satisfy several initial requirements to be entitled to the exemption. First, the child must have received at least one-half of his or her support during the calendar year from parents who have either divorced or legally separated, separated under a separation agreement, or lived apart at all times during the last six months of the calendar year.<sup>94</sup> Secondly, the child must have been in the custody of one or both of his parents for more than one-half of the calendar year.<sup>95</sup>

These initial requirements do not present problems in the typical case. If a relative or welfare agency has provided more than one-half of the support for the child in any calendar year, however, both of the divorced parents lose the entitlement to claim the dependency exemption.<sup>96</sup> When a third party has provided support to a household, the amounts will be allocated to each member of the home unless a contrary intent is established.<sup>97</sup> For purposes of this restriction, support contributed by the new spouse of a remarried parent will be considered as support provided by the parent.<sup>98</sup>

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<sup>91</sup>I.R.C. § 152 (1982 & Supp. III 1985). Under prior law, the parent who had custody for the greater part of the year was generally entitled to an exemption. This general rule had two exceptions. First, the noncustodial parent was entitled to the exemption if he contributed at least \$600 toward support for the child and the decree or separation agreement specified he was to receive the exemption. The second exception provided that the noncustodial parent was entitled to the exemption if he contributed \$1200 or more toward support of the child unless the custodial parent could establish that she provided more for the support of the child than the noncustodial parent. I.R.C. § 152(e) (1967); Treas. Reg. § 1.152-4.

<sup>92</sup>See Baron, *Modification of Divorce Decrees By Virtue of the 1984 Tax Amendment Relating to Dependency Exemptions*, Taxes Jan. 1987, at 43.

<sup>93</sup>I.R.C. § 152(e) (Supp. III 1985).

<sup>94</sup>*Id.* § 152(e)(1)(A). This requirement corresponds closely with the requirement relating to taxation of alimony under section 71. For some reason, however, section 152 does not apply where there is merely a "decree of support." See I.R.C. § 71(a)(3) (West Supp. 1987).

<sup>95</sup>I.R.C. § 152(e)(1)(B) (Supp. III 1985).

<sup>96</sup>See, e.g., *Hopkins v. Commissioner*, 55 T.C. 538 (1970) (wife's father provided over one-half support); *Frazier v. Commissioner*, T.C. Memo. 1973-21 (1973), *cert. denied*, 416 U.S. 990 (1974) (Aid for Dependent Children is considered contributed by government).

<sup>97</sup>Rev. Rul. 64-227, 1964-2 C.B. 47, *clarified by* Rev. Rul. 72-591, 1972-2 C.B. 84.

<sup>98</sup>Rev. Rul. 73-175, 1973-1 C.B. 58; Rev. Rul. 78-91, 1978-1 C.B. 36.

## B. EXCEPTIONS TO GENERAL RULE

Under the recodified section 152(e), there are three exceptions to the general rule that the custodial parent is entitled to the dependency exemption.<sup>99</sup> The noncustodial parent will be entitled to the exemption if: (1) the custodial parent signs a written declaration that he or she will not claim the exemption for the year (and the written declaration is attached to the noncustodial parent's tax return),<sup>100</sup> (2) over one-half of the support of the child is treated as having been received from an individual under a multiple support agreement," or (3) where there is a "qualified pre-1985 instrument" between the parties that provides that the non-custodial parent is entitled to the dependency exemption.<sup>102</sup> A "qualified pre-1985 instrument" is any separation agreement, decree of divorce, or separate maintenance decree, executed before January 1, 1985, that has not been modified thereafter to expressly provide that the exception does not apply.<sup>103</sup> Thus, a pre-1985 instrument can be modified to make the third exception inapplicable, thereby giving the noncustodial parent the entitlement only when the custodial parent releases his or her claim or where a multiple support agreement exists.

## C. PLANNING CONSIDERATIONS AND PROBLEM AREAS

The 1984 amendments to the Code eliminate specific dollar thresholds and thereby greatly simplify the issue of which parent is entitled to the dependency exemption. In most cases, the custodial parent will be entitled to claim the exemption unless he or she expressly waives the right to do so. The custodial parent may make a permanent declaration to waive this right.<sup>104</sup> In most cases, however, it would be

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<sup>99</sup>I.R.C. § 152(e) (1982 & Supp. III 1985).

<sup>100</sup>"*Id.* § 152(e)(2). The custodial parent may release the entitlement to the exemption for one year, multiple years, or all future years. Treas. Temp. Reg. § 1.152-4T(a) (1984) (Q and A 4). The written declaration can be made on I.R.S. form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, or an official form conforming to the substance of the I.R.S. form. Treas. Temp. Reg. § 1.152-4T(a) (1984) (Q and A 3).

<sup>101</sup>In a multiple support agreement several people will have an obligation to furnish support. I.R.C. § 152(1982 & Supp. III 1985). Under an I.R.C. § 152(c) multiple support agreement, an individual who furnishes less than half the support of a child, but more than ten percent, can claim a dependency exemption if no one else furnishes more than one-half of the child's support.

<sup>102</sup>I.R.C. § 152(e)(4) (Supp. III 1985). The noncustodial parent must also contribute at least \$600 toward the support of the child in the calendar year in which he or she claims the deduction for the child. Treas. Reg. § 1.152-4 (1979), *amended by* Temp. Treas. Reg. § 1.152-4 (1984).

<sup>103</sup>I.R.C. § 152(e)(4)(B) (Supp. III 1985).

<sup>104</sup>"Treas. Temp. Reg. § 1.152-4T(a) (1984) (Q and A 4).

advisable for a custodial parent to make an annual declaration to ensure compliance with the terms of the support order or agreement.<sup>105</sup>

The 1984 Act essentially lets the parties determine which one of them will claim the dependency exemption; they should not ignore this freedom to minimize their tax liabilities. In most instances, a nonworking parent should relinquish his or her claim to the exemption to allow the working parent to get the full benefit of the exemption. As the amount of the exemption will increase to \$2,000 by 1988<sup>106</sup> the custodial spouse should not waive the right to claim the exemption without receiving some corresponding benefit. In some instances, it may be more advantageous for a working parent to forego a dependency exemption in return for classifying support payments as non-deductible alimony.<sup>107</sup>

Although the 1986 Act increased the amount of the dependency exemption, it has taken the ability to claim the exemption away from higher income taxpayers. Under the 1986 Act, the benefit of an exemption is phased out once taxable income reaches a certain amount (\$149,250 for a joint return and \$89,560 for a single return) at the rate of five cents for each dollar of excess taxable income.<sup>108</sup> The Act also provides that a personal exemption is not allowed to an individual who is eligible to be claimed as a dependent on another taxpayer's return.<sup>109</sup>

One potential problem area with the new rules concerns joint custody situations. The focus of the new rules has changed from adding dollars to counting days, and, as a result, there could be disputes when custody has been shared. The probable approach to determine who the custodial parent is will be to rely on which parent actually had the child the greater number of days.<sup>110</sup> An equitable solution in a true joint-custody situation might be to alternate the entitlement to the exemption every year, particularly if both spouses are in the same tax bracket.

Another area of concern under the new law is where the noncustodial parent is making significant support payments pursuant to a pre-1985 instrument or decree that does not mention entitlement to the exemption.<sup>111</sup> Under the new law, the custodial parent is entitled

<sup>105</sup>See Hjorth, *supra* note 75; Mulliken, *supra* note 5, at 21.

<sup>106</sup>I.R.C. § 151 (1982) as amended by 1986 Act, *supra* note 7, § 103.

<sup>107</sup>Sander & Gutman, *supra* note 85, at A-33.

<sup>108</sup>1986 Act, *supra* note 7, § 101(a) (amending I.R.C. I 1(g)).

<sup>109</sup>*Id.* I 103(b) (amending I.R.C. I 151(a)).

<sup>110</sup>"Randall, *supra* note 6, at 10-37.

<sup>111</sup>For a discussion of the problem and some practical solutions, see Baron, *supra* note 92.



to the exemption, regardless of the amount contributed by the non-custodial parent. To exacerbate the problem, the noncustodial parent cannot obtain the exemption by seeking a judicial modification of the pre-1985 instrument because, under the new law, only the custodial parent can give up the exemption."<sup>112</sup> A possible solution to the dilemma might be to seek a court order directing the payee spouse to execute a written assignment in lieu of lowering child support payment~.'~

### **D. ENTITLEMENT FOR DEDUCTIONS AND CREDITS**

The 1984 Act modifies preexisting law to the benefit of separated parents by allowing either party to claim the child as a dependent for the purposes of deducting medical expenses.<sup>114</sup> Previously, medical expense deductions were limited to the parent who was actually entitled to claim the dependency exemptions.<sup>115</sup> Despite the new change, it will be advantageous in most cases for one parent to pay all of the child's medical expenses. This is particularly so as a result of 1986 Tax Reform Act, which increased the nondeductible floor for medical expenses.<sup>116</sup>

The entitlement to the dependency exemption also does not effect eligibility for the earned-income credit<sup>117</sup> or the child and dependent care credit.<sup>118</sup> Moreover, a custodial parent may be eligible to file as head of household even though the noncustodial parent is entitled to claim the child as a dependent.<sup>119</sup>

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<sup>112</sup>Davis v. Fair, 707 S.W.2d 711 (Tex. Ct. App. 1986). The court ruled that neither the trial court nor an appellate court could grant a deduction. The matter is governed by agreement between the parties.

<sup>113</sup>See Baron, *supra* note 92.

<sup>114</sup>1984 Act, *supra* note 4, § 423(a) (amending I.R.C. § 152(e)(6)); see I.R.C. § 213(d)(5) (West Supp. 1987). The new rules do not apply if over one-half of the support for the child is treated as having been received under a multiple support agreement.

<sup>115</sup>I.R.C. § 152(e)(6) (1982).

<sup>116</sup>1986 Act, *supra* note 7, § 133 (amending I.R.C. § 213). The Act increased the nondeductible floor from 5 to 7.5 percent. Moreover, the increase in the standard deduction will make it more difficult for taxpayers to benefit from itemizing deductions after 1986. *Id.* § 102(a) (amending I.R.C. § 63).

<sup>117</sup>I.R.C. § 32(a) (West Supp. 1987).

<sup>118</sup>I.R.C. § 243 (West Supp. 1987).

<sup>119</sup>I.R.C. §§ 2(b), 21(e)(5) (West Supp. 1987) Note, however, that a taxpayer cannot file as an abandoned spouse unless he or she is entitled to claim the exemption for a child. I.R.C. § 7703 (West Supp. 1987) (formerly I.R.C. § 143 (Supp. III 1985)).

<sup>120</sup>Hjorth, *supra* note 57; Lepow, *Tax Policy for Lovers and Cynics: How Divorce Settlement Became the Last Tax Shelter in America*, 62 Notre Dame L. Rev. 32 (1986); Rice, *The Overruling of the Davis Case by the Enactment of Section 1041*, 4 B.U.J. Tax L. 123 (1986).

## V. MARITAL PROPERTY DIVISIONS

### A. GENERAL RULES

The tax treatment of property transfers between divorcing spouses prior to 1984 was complex, harsh, and unpopular.<sup>120</sup> Based on the Supreme Court decision in *United States v. Davis*,<sup>121</sup> a transfer of appreciated property between spouses resulted in taxable gain to the transferor to the extent of the difference between the fair market value at the time of the transfer and the cost basis.<sup>122</sup> This rule often worked a hardship on separating or divorcing couples at a time when they could least afford it.

In 1984, Congress agreed that divorce is an inappropriate time to tax transfers between spouses and added section 1041 to the Code, overruling the *Davis* decision.<sup>123</sup> The new rule provides that no gain or loss will be recognized when property is transferred either to a spouse or to a former spouse incident to divorce.<sup>124</sup>

<sup>121</sup> 370 U.S. 5 (1962). The *Davis* test was based solely on state law. Thus, the rule did not apply in community property states where an equal division of property did not constitute a taxable event. See generally Barton, *Tax Aspect of Divorce and Property Settlement Agreements — The Davis, Gilmore, and Patrick Cases*, 16 U.S.C. Tax Inst. 421 (1964).

<sup>122</sup> See I.R.C. §§ 729(k) and 101(c) (1982) (repealed by 1984 Act, *supra* note 4 § 421(b)).

<sup>123</sup> 1984 Act, *supra* note 4, § 421(a); see H.R. Rep. No. 423 (Part 2), 98th Cong., 2d Sess. 1491 (1984).

<sup>124</sup> I.R.C. § 1041 (Supp. III 1985). This new section to the Code reads:

SEC. 1041. TRANSFERS OF PROPERTY BETWEEN SPOUSES OR INCIDENT TO DIVORCE.

(a) General Rule. — No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) —

(1) a spouse, or

(2) a former spouse, but only if the transfer is incident to the divorce

(b) Transfer Treated as Gift; Transferee Has Transferor's Basis. — In the case of any transfer of property described in subsection (a) —

(1) for purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and

(2) the basis of the transferee in the property shall be the adjusted basis of the transferor.

(c) Incident to Divorce. — For purposes of subsection (a)(2), a transfer of property is incident to the divorce if such transfer —

(1) occurs within 1 year after the date on which the marriage ceases, or

(2) is related to the cessation of the marriage.

(d) Special Rule Where Spouse is Nonresident Alien. — Paragraph (1) of subsection (a) shall not apply if the spouse of the individual making the transfer is a nonresident alien.

## ***B. SECTION 1041-TRANSFERS DURING MARRIAGE***

No gain or loss is recognized on all transfers from an individual to a spouse under the new Code provision.<sup>125</sup> The parties need not be contemplating a divorce or legal separation at the time of the transfer for section 1041 to apply.<sup>126</sup> The new law treats interspousal transfers as gifts for tax purposes; the transferor will not be taxed on the transfer and the transferee's basis will be the same as the transferor's.<sup>127</sup>

Section 1041 tax treatment applies whether the transfer is in exchange for the relinquishment of marital right, for cash, or for any other type of consideration.<sup>128</sup> It includes not only direct transfers, but also to transfers in trust.<sup>129</sup> The discharge of an indebtedness is also a qualifying transfer falling within section 1041. Therefore, it is not a taxable event for the debtor spouse.<sup>130</sup>

The nonrecognition accorded under 1041 applies only to transfers between spouses or former spouses. It does not extend to transfers made between two persons who later marry or to transfers between unmarried persons living together.<sup>131</sup> The section also does not apply to transfers from an individual to a corporation, even if the corporation is controlled by the spouse.<sup>132</sup>

A special rule for transfers to nonresident alien spouses was added to the code to ensure that the property will eventually be subject to United States tax laws. Under the rule, nonrecognition treatment will not apply to transfers to a nonresident alien during the marriage.<sup>133</sup> The rule does not affect transfers during marriage from a nonresident alien to a resident spouse.<sup>134</sup>

## ***C. SECTION 1041-TRANSFERS INCIDENT TO DIVORCE***

Section 1041 also provides that property transfers between two spouses "incident to divorce" do not result in a taxable gain.<sup>135</sup> All

<sup>125</sup>Treas. Temp. Reg. § 1.1041-1T (1984)(Q and A 1).

<sup>126</sup>*Id.* (Q and A 2).

<sup>127</sup>I.R.C. § 1041 (Supp. III 1985); Treas. Temp. Reg. § 1.1041-1T(a) (1984) (Q and A 10).

<sup>128</sup>Treas. Temp. Reg. § 1.1041-1T(a) (1984) (Q and A 2).

<sup>129</sup>*Id.* (Q and A 1).

<sup>130</sup>*See generally* Hjorth, *supra* note 57.

<sup>131</sup>Treas. Temp. Reg. § 1.1041-1T(a) (1984) (Q and A 2).

<sup>132</sup>*Id.* (Q and A 2) (example 3).

<sup>133</sup>I.R.C. § 1041(d) (Supp. III 1985); Treas. Temp. Reg. § 1.1041-1T(a) (1984) (Q and A 3).

<sup>134</sup>I.R.C. § 1041(d) (Supp. III 1985).

<sup>135</sup>I.R.C. § 1041(c) (Supp. III 1985).

transfers made between spouses within one year after the date of the divorce (or annulment) qualify as section 1041 transfers.<sup>136</sup>

Transfers between former spouses occurring more than one year from the date of the divorce are also included in section 1041 if the transfer was “related to the cessation of marriage.”<sup>137</sup> According to temporary Treasury Department regulations, transfers more than six years after divorce are presumed not to be “related to the cessation of marriage.”<sup>138</sup> This presumption can be rebutted only by showing that the transfer was made to effect a division of property owned by the parties at the time of the divorce.<sup>139</sup>

Unlike transfers made to a nonresident alien spouse during the marriage, transfers made to a nonresident alien incident to divorce appear to qualify for section 1041 treatment.<sup>140</sup> The code section allowing parties to escape tax on appreciated property by transferring it to a former nonresident alien spouse may be a technical oversight because it appears to be contrary to congressional intent. It is possible that the Treasury Department will either interpret the code provisions in this area differently or seek a legislative amendment.

## ***D. TAX CONSEQUENCES OF SECTION 1041 TRANSFERS***

Qualifying transfers between spouses, or former spouses, incident to divorce, will be treated as gifts for tax purposes.<sup>141</sup> Thus, no gain or loss is recognized and the transferee receives the transferor’s adjusted basis regardless of whether it is less than, equal to, or greater than the property’s fair market value at the time of the transfer.<sup>142</sup> Moreover, the transferee’s basis is carried over even if the property is subject to liabilities exceeding the basis.<sup>143</sup>

The transferee also receives any tax burdens associated with the transferred property.<sup>144</sup> For example, if the transferred property is subject to investment tax recapture on sale or conversion to personal use, the transferee’s subsequent conversion of the property to personal

<sup>136</sup>Treas. Temp Reg. § 1.1041-1T(b) (1984)(Q and A 6(2)).

<sup>137</sup>I.R.C. § 1041 (Supp. III 1985); Treas. Temp. Reg. § 1.1041-1T(b) (1984)(Q and A 6(2)).

<sup>138</sup>Treas. Temp. Reg. § 1.1041-1T(b) (1984) (Q and A 7).

<sup>139</sup>*Id.*

<sup>140</sup>Hjorth, *supra* note 57. Inexplicably, the nonresident alien rule in I.R.C. 1041(d) is made applicable only to transfers between spouses.

<sup>141</sup>Treas. Temp. Reg. § 1.1041-1T(d) (1984) (Q and A 10).

<sup>142</sup>*Id.* (Q and A 10).

<sup>143</sup>*Id.* (Q and A 11).

<sup>144</sup>*Id.* (Q and A 12).

use will generate investment tax credit recapture.<sup>145</sup> The transferee spouse must therefore be alert to potential adverse tax consequences associated with any marital asset he or she is to receive upon divorce.

Practitioners should also note that not all tax treatment afforded true gifts under the Code will extend to interspousal transfers. For example, in the case of 1041 property transfers, the transfer of an installment obligation is not taxable, and the transferee always takes the basis of the transferor even if a loss could be realized by using the fair market value of the property when it was transferred.<sup>146</sup> This differs from the tax treatment afforded gifts, because in this situation the transferee could elect to use the fair market value at the time of the transfer to compute a loss on the gift.<sup>147</sup>

Section 1041 will operate to shift the tax burden on unrealized appreciation of the property from the transferor to the transferee spouse. Thus, when marital property is being divided, the transferee should insist that the value of the transferred property be discounted to take into account the resulting tax when he or she eventually sells the property.<sup>148</sup> The tax adjustment taken for appreciated property should reflect both the contingent nature of any future tax and the fact that the tax will be paid with future dollars.

Conversely, since losses are also not recognized on 1041 transfers, it might be more advantageous to sell property that has lost value and transfer the proceeds to the spouse. This disposition could entitle the transferor to recognize loss in the year of sale.

The courts are not in agreement over whether the value of a marital asset should be reduced or increased by the eventual tax consequences when the property is later sold or distributed.<sup>149</sup> Some courts have held that the potential tax consequences cannot be considered at the time of the marital distribution,<sup>150</sup> others employ a concept of "rea-

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<sup>145</sup>*Id.* (Q and A 13). Note, however, that property transferred under section 1041 will not be treated as an event triggering the investment tax recapture. *Id.* (Q and A 12). See generally Cunningham, *Domestic Relations Tax Reform—Certain Provisions Remain Troublesome*, 65 Mich. B.J. 990 (1986).

<sup>146</sup>Treas. Temp. Reg. § 1.1041-1T(d) (1984) (Q and A 11).

<sup>147</sup>See I.R.C. § 1015(a) (1982).

<sup>148</sup>Two articles discussing the "low basis tax trap" are Brawerman, *How to Plan Alimony and Property Settlement Under The Tax Reform Act*, 36 U.S.C. Tax. Inst. 3-1 (1985) and Cunningham, *supra* note 145, at 991.

<sup>149</sup>*Compare* Rosenberg v. Rosenberg, 497 A.2d 485 (Md. 1985) (potential tax consequences cannot be considered) with Liddle v. Liddle, 410 N.W.2d 196 (Wisc. Ct. App. 1987) (tax consequences can be considered). See generally *Tax Consequences of Property Division*, 4 Equitable Distribution Journal 253 (Sept. 1987).

<sup>150</sup>Rosenberg v. Rosenberg, 64 Md. App. 487, 497 A.2d 485 (1985).

sonable speculation" to determine whether tax liability should be deducted from valuing marital property.<sup>151</sup>

### ***E. TRANSFERS OF THE FAMILY RESIDENCE UNDER SECTION 1041***

In many divorces, the largest asset divided or exchanged is the personal family residence. Practitioners must carefully plan transfers of this asset to take full advantage of special code provisions enabling taxpayers to defer or exclude gain realized upon the sale of a principal residence.<sup>152</sup>

A fairly typical situation upon marital dissolution is to award one spouse possession of the family home and order him or her to pay the former spouse a fixed sum at a later date. In effect, the transferor spouse has disposed of his or her interest in the home for the fixed sum. Nevertheless, the transferee spouse alone will be subject to tax on the gain realized upon a subsequent sale to a third party, unless the nonrecognition of gain treatment under section 1034 applies to the subsequent sale.<sup>153</sup> The transferor spouse, on the other hand, does not recognize any gain or loss on the "sale" of the home to his or her spouse and will not have any interest in the subsequent appreciation or depreciation.<sup>154</sup>

Another common method to exchange the family home upon a dissolution is to award possession of the family home to one spouse until a specified date, at which time the property is to be sold and the proceeds shared. If the home is sold to a third party, a transfer under 1041 does not occur because it is not a transfer between spouses or former spouses. In this instance, both former spouses will be subject

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<sup>151</sup> *Selchert v. Selchert*, 280 N.W.2d 293 (Wisc. Ct. App. 1979); *Liddle v. Liddle*, 410 N.W.2d 196 (Wisc. Ct. App. 1987).

<sup>152</sup> Two code sections provide tax benefits for taxpayers selling a principal residence. Section 121 offers a once-in-a-lifetime exclusion for up to \$125,000 gain from the sale of a principal residence for taxpayers who have obtained the age of 55. I.R.C. § 121 (1982). Section 1034 allows taxpayers to defer gain realized on the sale of a principal residence if a new home is purchased within a statutory four-year replacement period beginning two years before the date of sale and ending two years after the former home is sold. Gain is deferred under this section only to the extent the purchase price of the new home exceeds the adjusted sales price of the former home. I.R.C. § 1034(a) (West Supp. 1987). A special rule under section 1034(h) suspends the replacement period for up to four years after the date of the sale of the old residence for taxpayers on active duty. For taxpayers serving overseas, the replacement period can be extended for up to eight years. I.R.C. § 1034(h) (West Supp. 1987).

<sup>153</sup> I.R.C. § 1034 (West Supp. 1987). Since the capital gains exclusion was repealed by the 1986 Tax Reform Act, this gain will be taxed at the ordinary income tax rates if section 1034 is inapplicable. I.R.C. § 1202 (1982 & Supp. III 1985) (repealed by 1986 Act, *supra* note 7, § 301).

<sup>154</sup> Treas. Temp. Reg. I 1.1041-1T(d) (1984) (Q and A 10).

to tax on the gain realized over their combined basis unless recognition of the gain can be deferred under section 1034.<sup>155</sup> The non-possessory former spouse, however, will probably not be able to defer tax liability on a recognized gain for his or her share under section 1034 because the home was not his or her principal residence at the time of sale.<sup>156</sup> The tax treatment in this example becomes complicated if the possessory spouse purchases the interest of the nonpossessory spouse at the end of the replacement period. If this occurs, the sale does not qualify as a 1041 transfer unless it was made less than one year from the date of dissolution or within six years of this date and pursuant to a divorce or separation instrument.<sup>157</sup> If the sale took place outside these time periods, it would constitute a taxable event for the nonpossessory spouse.

If a jointly owned residence is sold to a third party upon the divorce, both the husband and wife will be entitled to the benefits of section 1034 if they both acquire a new residence within the statutory replacement period at a cost in excess of their respective shares in the home.<sup>158</sup> A spouse who does not purchase a qualifying replacement residence must pay a tax on his or her share of the gain from the sale of the former residence.<sup>159</sup>

One potential problem regarding entitlement to section 1034 deferral arises when one joint-owning spouse vacates the family home and establishes a new residence before the family home is sold. According to a recent case, the vacating spouse is not eligible for 1034 tax treatment because the former home was not being used as his or her principal residence at the time of sale.<sup>160</sup> Consequently, divorcing or separating couples should attempt, as far as practical, to allow the

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<sup>155</sup>I.R.C. § 1034 (WestSupp. 1987).

<sup>156</sup>To qualify for deferral of tax under I.R.C. § 1034, the home must be used as the taxpayer's principal residence at the time of sale. *See generally* Ingold, *Buying, Selling, and Renting the Family Home: Tax Consequences for the Military Taxpayer After the 1986 Tax Reform Act*, The Army Lawyer, Oct. 1987, at 23.

<sup>157</sup>I.R.C. § 1041 (WestSupp. 1987) (added by 1984 Act, *supra* note 4, § 422(a)).

<sup>158</sup>Rev. Rul. 74-250. 1974-1 C.B. 202. The replacement residence must have been purchased within the statutory replacement period. I.R.C. § 1034 (WestSupp. 1987).

<sup>159</sup>Rev. Rul. 80-5, 1980-1 C.B. 284. A special rule in section 1034(g) provides that one or both married taxpayers may be considered the owner of jointly held property if a consent is filed. This option is not available to divorced or legally separated couples because the new replacement residence must be used by the taxpayer and the spouse as their principal residence.

<sup>160</sup>*Young v. Commissioner*, 49 T.C.M. (CCH) 102 (1985). This case is based on the long-standing rule that the residence must be used as the taxpayer's principal residence to qualify for nonrecognition of gain treatment. *See Stolk v. Commissioner*, 40 T.C. 345 (1963); *accord* *Demeter v. Commissioner*, 30 T.C.M. (CCH) 863 (1971); *Steigler v. Commissioner*, 23 T.C.M. (CCH) 412 (1964). This decision has been criticized as "questionable" because, under other circumstances, taxpayers have been able to claim that a home is a personal residence despite an involuntary absence. *Asimow, Alimony and*

spouse who needs the nonrecognition of gain benefits of section 1034 to use the family home as his or her principal residence. If this is not possible, the home may still qualify as the nonpossessory spouse's principal residence if immediate efforts to sell the home are made after vacating it.<sup>161</sup>

In almost all instances, it will be advantageous for a divorcing spouse to receive residential property having a high carry over basis. Certain taxpayers may, however, be able to avoid paying tax on low basis, appreciated property by taking advantage of section 121 of the Code.<sup>162</sup> This section grants a once-in-a-lifetime exclusion of \$125,000 on gain realized from the sale of a residence to taxpayers who have owned and occupied the home for three of the five years preceding the sale and who have reached the age of 55.<sup>163</sup> If the taxpayers are still married when the residence is sold, both spouses must join in making the section 121 exclusion election.<sup>164</sup> This requirement applies even if the taxpayers are electing to exclude gain on a separately owned home and even if a separate return is filed in the year of sale.<sup>165</sup> If an election to exclude gain was made by both spouses at any time during the marriage, neither party can thereafter use section 121 to exclude gain on the sale of a home.<sup>166</sup>

The timing of the sale of a home can therefore be crucial when a divorce or separation is contemplated. It may be advantageous to transfer ownership of the home to one spouse and wait until after the divorce is final to sell the house. In this situation the owner could elect to exclude gain upon the sale of the home, and the former non-

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*Marital property Divisions under the 1986 Act*, Taxes, June 1987, at 352, 356. See generally Hartwell, *Sale or Exchange of Personal Residence: Section 1034*, 31 Tax. L. Rev. 531 (1976).

<sup>161</sup>See e.g., *Bolaris v. Commissioner*, 776 F.2d 1428 (9th Cir. 1985); *Clapman v. Commissioner*, 63 T.C. 505 (1975). Note, however, that the home should not be rented for a period exceeding the 1034 statutory replacement period. See generally Connealy, *Tax Consequences on the Disposition of a Personal Residence*, 49 UMKC L. Rev. 138 (1981); Handler, *Acquisition, Financing, Refinancing and Sale or Exchange of Residence*, 179-4th Tax Mgmt. (B.N.A. 1987).

<sup>162</sup>I.R.C. § 121 (1982); Treas. Reg. § 1.121-5 (1979). An excellent article discussing this section is Gately, *When Should a Taxpayer Use the Once in a Lifetime Section 121 Election?*, 12 J. Real Estate Tax § 8 (Fall 1984).

<sup>163</sup>I.R.C. § 121 (1982); Treas. Reg. § 1.121-1(a) (1979).

<sup>164</sup>Treas. Reg. § 1.121-4(a)(1) (1983).

<sup>165</sup>*Id.*

<sup>166</sup>I.R.C. § 121(d) (1982); Treas. Reg. § 1.121-4 (1983). Marital status is determined as of the date of sale of the principal residence. Thus, a taxpayer is not considered married for purposes of the exclusion if he or she is legally separated under a decree of divorce or separate maintenance at the time of the sale. Treas. Reg. § 1.121-5(f) (1979). Moreover, a spouse need not join in making the election on a joint return with respect to a residence sold by the other spouse during the year but prior to the marriage. The one-time exclusion would still be available to other spouse after a divorce. Rev. Rul. 87-104, 1987-43 I.R.B. 12.



owner spouse would not be bound by the election. Alternatively, divorcing couples may find it beneficial to sell a jointly owned home after the divorce is final. If each spouse meets the other section 121 requirements, they can elect to exclude up to \$125,000 each (for a \$250,000 total) because they would not be considered married at the time of sale.

## ***F. TRANSFERS OF OTHER TYPES OF PROPERTY UNDER SECTION 1041***

Enactment of section 1041 should provide more flexibility to the parties in making other types of property settlements. For example, if an annuity is transferred incident to divorce or separation, the transferee is entitled to recover the transferor's investment in the contract before paying taxes on any annuity payment.<sup>167</sup> This rule applies even if the annuity payments discharge an alimony obligation of the transferor.

The enactment of section 1041 should also promote the use of alimony trusts. Under 1041, the transfer of income in trust to a spouse or former spouse is treated as a property settlement so that the transferor recognizes no gain or loss and the transferee spouse is regarded as the beneficiary. A transferee receiving a beneficial interest in a trust is entitled to tax-free distribution of the principal even if it discharges an alimony obligation of the settlor.<sup>168</sup> Moreover, neither the complex recapture rules, nor the restrictions on characterization of child support of section 71, apply to trusts.<sup>169</sup> Divorce attorneys should, however, keep in mind that, as a result of a change in the law under 1986 Tax Reform Act, any transfer of property into a section 1041 trust is a taxable event if the basis is less than the liabilities.<sup>170</sup> As a result of this change, section 1041 will not apply to the extent that the sum of the liabilities assumed and the amount of liabilities to which the property is subject exceeds the adjusted basis of the property.

Another benefit of the newly enacted section 1041 involves the transfer of life insurance contracts, which are often used to fund alimony trusts or exchanged for the relinquishment of marital obli-

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<sup>167</sup> See I.R.C. §§ 72, 1041 (West Supp. 1987).

<sup>168</sup> See Rice, *supra* note 120, at 29. An excellent article exploring planning alternatives creating tax advantages under section 1041 is Lepow, *supra* note 1, at 47-52.

<sup>169</sup> See Lepow, *supra* note 20, at 67.

<sup>170</sup> I.R.C. § 1041(e) (West Supp. 1987) (added by 1986 Act, *supra* note 7, § 1842(b)); see also O'Connell, *Divorce After the Act*, 126 Trusts and Est. June 1987, at 44, 54. The transferee's basis under these circumstances is adjusted to take into account any gain recognized.

gations. Previously, the transfer of life insurance policies resulted in the inclusion of the proceeds in the transferee's gross income as a result of the "transfer for value rule."<sup>171</sup> By application of section 1041, the transfer of a life insurance contract to a spouse incident to divorce or separation will no longer result in the proceeds eventually being included in the transferee's gross income.<sup>172</sup>

Section 1041 also offers advantages to spouses transferring installment obligations incident to divorce. Prior to 1984, the transfer of an installment obligation in a marital property settlement resulted in gain or loss to the transferor.<sup>173</sup> To allow spouses to transfer these obligations without recognition of gain or loss, Congress amended the Internal Revenue Code to provide that no gain or loss is recognized on the transfer of installment obligations between spouses or former spouses.<sup>174</sup> As with other section 1041 property, the transferee assumes the transferor's adjusted basis in the installment property.

The tax consequences of property transfers of nonqualified pension benefits, such as armed forces retirement pay, could present some problems under section 1041. Normally, the tax issue of these transfers will turn on the type of payments ordered and the place where the divorce occurred.<sup>175</sup> Of course, if the court makes no present determination of pension benefits at the time of the divorce, no tax consequences arise. There should also be no tax problems when a divorce court in a common law state orders the wage earner to pay his or her spouse a lump sum payment to relinquish a claim, because

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<sup>171</sup> I.R.C. § 101(a) (1982). Under this section, the amount included in the transferee's gross income was the amount the proceeds exceeded the actual value of consideration transferred and any premiums subsequently paid.

<sup>172</sup> See Rice, *supra* note 120, at 23. Moreover, alimony payments continuing upon the payor's death because of an insurance policy will not be included in the recipient's income as alimony.

<sup>173</sup> I.R.C. § 453(A) (1982).

<sup>174</sup> 1984 Act, *supra* note 4, § 421(b)(3) (amending I.R.C. § 453(B)(g)). Under a 1986 Tax Reform Act change, when an installment obligation is transferred to a trust, the transferor is generally required to recognize any prior untaxed gain at the time of transfer. See I.R.C. § 453(B)(g) (West Supp. 1987).

<sup>175</sup> Property division of pension benefits should be distinguished from situations where a former spouse is awarded a share of pension or retirement pay as alimony. Under these circumstances, the payments should be treated as alimony if they meet all other code requirements. Payments made pursuant to a community property settlement as compensation for the spouse's share in the property are not alimony, however. See Rev. Rul. 69-471, 1969-2 C.B. 10. A comprehensive article, predating the enactment of I.R.C. section 1041, on taxation of pension benefits is Stripling, *The Transfer of Pension Benefits Incident to Divorce and Separation: An Analysis*, 54 J. Tax. 216 (1981). A recent law review note addressing this area is Note, *Federal Tax Treatment of Lump Sum Distributions from Disqualified Pension Plans*, 12 U. Dayton L. Rev. 91-109 (Fall 1986).

this is merely a nontaxable equitable property distribution.<sup>176</sup> An issue could be presented, however, if a nonemployee spouse in a community property state receives a property or cash lump sum payment equal to the present value of a community pension because he or she might well be deemed to be receiving ordinary income.<sup>177</sup>

The tax treatment accorded a court award of the future pension to each spouse may also turn on whether the spouses live in a community property state. In a community property state, the equal division of pension plans is normally a nontaxable event.<sup>178</sup> In common law states, however, the transfer of a percentage of future pension benefits to a non-employee former spouse could cause assignment of income problems. Because the tax consequences of dividing retirement pay or pension benefits are largely unsettled, the best solution may be to include a provision in the separation agreement describing the assumed tax consequences and provide for an adjustment if a different rule is applied.<sup>180</sup>

Practitioners should distinguish the foregoing rules from those involving the tax treatment of qualified plans and individual retirement accounts. The general rule under section 401(a)(13) is that a qualified pension plan may not permit the transfer of benefits pursuant to divorce or separation.<sup>181</sup> This "anti-alienation" rule, however, does not apply if a "qualified domestic relations order," consisting of any judgment, decree, or order relating to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, or other dependent of the plan participant is made pursuant to state law.<sup>182</sup> An order generally is "qualified" if it recognizes the right of an alternate payee to receive all or a portion of the benefits under the plan and does not require the plan to provide increased benefits.<sup>183</sup> A qualified plan may provide that a former spouse of the

<sup>176</sup> The payor would not be entitled to a deduction for the transferred amount, but should be able to add payments as adjustments to the basis in his or her pension plan. See Rev. Rul. 69-471, 1969-2 C.B. 10.

<sup>177</sup> Sander & Gutman, *supra* note 85.

<sup>178</sup> This is based on the federal income tax principle that property is taxable to the owner of the property. *Helvering v. Horst*, 311 U.S. 112 (1940).

<sup>179</sup> Under the assignment of income doctrine, a taxpayer may not avoid tax liability by transferring a right to receive future income to a third party. *Lucas v. Earl*, 281 U.S. 111 (1930). For a discussion of this issue see Mattei, 1984 *Deficit Reduction Act: Divorce Taxation*, 1986 Wis. L. Rev. 177.

<sup>180</sup> See *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984). Another possible solution is to request a private letter ruling from the Internal Revenue Service. See Sander and Gutman, *supra* note 176.

<sup>181</sup> I.R.C. § 401(a)(13) (West Supp. 1987).

<sup>182</sup> I.R.C. § 414(p)(1)(B) (West Supp. 1987). This section was added to the code by the Retirement Equity Act, P.L. 98-397, 98 Stat. 1426 (1984).

<sup>183</sup> The order must contain specific information specified in the Code. I.R.C. § 414(p)(4) (West Supp. 1987). The qualified order may not require the plan to provide a benefit

participant be treated as a surviving spouse for purposes of the joint and survivor and early retirement annuity provisions.<sup>184</sup> The new law removes most bars to the division of qualified pension plans on divorce. If a qualified domestic relations order is issued, the nonemployee spouse receiving the annuity benefits is treated as a distributee, and he or she must recognize ordinary income to the extent the employee spouse had made a deductible contribution to the plan during marriage.<sup>185</sup>

The Code also permits an individual to transfer his or her Individual Retirement Account (IRA) to a former spouse as part of a divorce settlement.<sup>186</sup> It should also be noted that the payee spouse may treat alimony received as "compensation received" for purposes of making IRA contributions.<sup>187</sup> Nonemployee spouses, however, cannot take advantage of the special rule in the Code permitting other employees to report lump sum distributions of employee benefits as if it were paid over ten years.<sup>188</sup> The nonemployee spouse can, however, mitigate the tax disadvantage of a lump sum distribution merely by transferring the lump sum distribution to a qualifying IRA.<sup>189</sup>

Practitioners should examine all marital property transfers closely because the beneficial tax treatment available under section 1041 will not necessarily apply to transfers of all types of marital property. For example, the section does not shield from recognition income that is ordinarily recognized upon the assignment of income to a spouse or former spouse.<sup>190</sup> Therefore, the deferred accrued interest on Series E and EE United States savings bonds, from their date of issuance to the date of transfer, must be included in the transferor's gross income.<sup>191</sup> The transferee's basis in the bonds after the transfer is

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or distribution option not otherwise available under the plan. For comprehensive discussion of the requirements for a qualified order, see Westbrook, *Qualified Domestic Relations Orders*, 9 U. Ark. Little Rock L.J. 487 (1986-87).

<sup>184</sup>I.R.C. §§ 401(a)(11), 417 (West Supp. 1987) (added by 1984 Act, *supra* note 4).

<sup>185</sup>I.R.C. §§ 402(a)(9), 72(w)(10) (West Supp. 1987).

<sup>186</sup>I.R.C. § 402(a)(6)(F), (West Supp. 1987). This does not extend to qualified Keogh plans. I.R.C. § 408(d)(6) (West Supp. 1987).

<sup>187</sup>I.R.C. § 402(a)(5)(D) (West Supp. 1987). See generally Hira and Swanson, *Individual Retirement Accounts: An Update After the DRA*, 16 The Tax Advisor 285 (May 1985).

<sup>188</sup>See O'Connell and Kittrell, *The Tax Effects are Easier to Predict*, 8 Family Advocate 11 (1985).

<sup>189</sup>*Id.* at 13.

<sup>190</sup>Temp. Treas. Reg. § 1.1041-1T (1984); see I.R.C. § 1041(e) (West Supp. 1987).

<sup>191</sup>Rev. Rul. 87-112, 1987-2 C.B. 44; see also Treas. Reg. § 1.454-1(a); Rev. Rul. 54-143, 1954-1 C.B. 12 (holding that a taxpayer had to recognize interest accrued on a Series E bond when she transferred it to her daughter). This assumes the taxpayer had not recognized the interest each year, as it accrued.

equal to the transferor's basis plus the interest income that the transferor included in his gross income as a result of the transfer.<sup>192</sup>

Section 1041 is a highly beneficial change to divorce tax laws. This section allows the parties to devise marital property settlements to postpone large tax liabilities at the time of divorce or separation. Moreover, the enactment removes the injustice of taxing a spouse on appreciated property he or she is required to transfer incident to divorce.

## VI. FILING STATUS

Tax planning for divorced or separated spouses should include careful consideration of the most advantageous filing status. If a divorce decree has not yet been issued, three possible filing choices exist for the separated taxpayer: filing a joint return, married filing a separate return, or filing as an "abandoned spouse." The most favorable, from a tax savings standpoint, would be to qualify as an "abandoned spouse" under section 143(b).<sup>193</sup> This filing status is available to married individuals if four requirements are met: (1) the taxpayer has maintained a home constituting the principal place of abode of a child of the taxpayer for more than one-half of the tax year, (2) the taxpayer is entitled to the dependency exemption for the child,<sup>194</sup> (3) the taxpayer furnishes over one-half of the support for the child, and (4) the taxpayer's spouse was not a member of the household for the last six months of the taxable year.<sup>195</sup> It is not necessarily required that a spouse have been deserted to qualify under this provision. In fact, both spouses could qualify if they each took a child and provided over one-half of the support for the child in their custody.

The spouse meeting all four prerequisites under section 143 will be treated as not married for tax purposes. For example, this taxpayer will not be obligated to use the married filing separately provisions and can itemize deductions even if the other spouse does not.<sup>196</sup> More significantly, the abandoned spouse will be entitled to claim the generous standard deduction available for head of household filers. The

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<sup>192</sup> Rev. Rul 87-112, 1987-2 C.B. 44.

<sup>193</sup> I.R.C. § 143(b) (West Supp. 1987).

<sup>194</sup> A taxpayer does not have to be entitled to claim the exemption for purposes of obtaining this filing status if the reason for the lack of entitlement is either that the taxpayer waived the entitlement or that a pre-1985 decree gives the entitlement to the other parent. I.R.C. §§ 143(b)(1) and 152(e)(2), (4) (West Supp. 1987).

<sup>195</sup> I.R.C. § 143(b) (West Supp. 1987). A spouse temporarily absent by virtue of illness, military service, education, or vacation will be considered as a member of the taxpayer's household. Treas. Reg. § 1.143-1(b)(5) (1971).

<sup>196</sup> The other spouse will be treated as being married for tax purposes. See *Shippole v. Commissioner*, T.C. Memo 1976-1378.

status results in a higher standard deduction than the married filing separately category.<sup>197</sup>

Married spouses who cannot qualify under section 143 must file either as married filing jointly or married filing separately. Prior to 1986, it was almost always advantageous for married couples to file joint returns because the tax rates for married taxpayers filing separately were higher than the rate for single persons.<sup>198</sup> Under the tax rates in effect as a result of the 1986 Tax Reform Act, it may not always be beneficial for a separated spouse to file joint returns, especially if the spouse can claim personal exemption deductions for a child.<sup>199</sup> Separated taxpayers should also carefully weigh the disadvantage that a joint return will normally expose both spouses to joint and several liability for any tax due on the return.<sup>200</sup> Because of this risk of liability, a spouse having little or no income should not agree to file a joint return unless he or she receives part of the tax savings or some other advantage.<sup>201</sup> Even under this circumstance, the low-income spouse should insist on a "hold harmless" provision if the separation agreement requires signing a joint return.<sup>202</sup> If both of the parties are receiving income, the potential tax liability for joint and separate returns should be computed to determine which method results in a higher tax savings.

If the parties have received a final decree of divorce or separate maintenance, they must file separate returns unless they can qualify for the preferential head-of-household filing status.<sup>203</sup> A divorced spouse will be entitled to the head-of-household rate if he or she pays over

<sup>197</sup> I.R.C. § 63 (West Supp. 1987). The standard deduction for head of household filers beginning in tax year 1988 is \$4400, which is \$1400 more than the amount for individual return status, and \$1900 more than that for married individuals filing separately.

<sup>198</sup> I.R.C. § 1(c) (1982 & Supp. III 1985).

<sup>199</sup> See I.R.C. §§ 1(c), (d) (West Supp. 1987). Another situation when filing separately might be more advantageous is if one spouse had huge deductions and the two spouses' incomes were equal.

<sup>200</sup> I.R.C. § 6013(d)(3) (West Supp. 1987). The 1984 Act extends help to the innocent spouse who signed a joint tax return if small amounts of income were omitted or in some cases where small deductions were erroneously claimed. See generally Brawerman, *How to Plan Alimony and Property Settlements under the Tax Reform Act*, 36 U.S.C. Tax Inst. 3-1 (1984); Zimmerman, *The Domestic Relations Act Expands the Innocent Spouse Provisions*, 17 Tax Advisor 294 (1986).

<sup>201</sup> See Brawerman, *supra* note 175.

<sup>202</sup> See generally Quick and DuCanto, *Joint Tax Liability and the Innocent Spouse Doctrine in Common Law and Community Property Jurisdictions: A Review of Code Section 6013(e) and its Progeny*, Section 66, 17 Fam. L. Q. 65 (1983).

<sup>203</sup> I.R.C. § 2(b) (West Supp. 1987). The 1985 Act, *supra* note 4, § 423, reduced to six months the amount of time the taxpayer's home had to be the child's principal place of abode. Note that the home need not be the taxpayer's principal place of abode, only the child's.

one-half the cost for maintaining a home which constitutes his or her home. The home must be the principal place of abode of a child of the marriage for more than one-half of the year.<sup>204</sup> Although married taxpayers normally cannot qualify for head-of-household tax status, a spouse meeting the abandoned spouse requirements of section 143(b) will be considered single and, therefore, eligible to file as head of household.<sup>205</sup> Note that both divorced spouses could be eligible for head-of-household status if each has custody of at least one child and provides the child's principal place of abode.

The head-of-household filing status offers a significant tax advantage to the taxpayer under the 1986 Tax Reform Act. The standard deduction for these filers has been increased dramatically to \$1400 more than the deduction amount for single filers.<sup>206</sup>

Although the sweeping Tax Reform Act of 1986 did not significantly change the rules regarding divorce taxation, it stands to have a major impact on divorce tax planning. The reduced tax rates and simplified tax brackets under the new Act will greatly diminish the significance of shifting tax burdens by using alimony payment deductions.<sup>207</sup> Practitioners should carefully consider the impact of the new tax rates, revised tax brackets, and increased personal exemption and standard deduction amounts under the 1986 Act when conducting tax planning for divorcing and separating clients. What has in the past resulted in considerable tax reductions may not hold true in light of the 1986 Tax Reform Act.<sup>208</sup>

## VII. ATTORNEY'S FEES

Parties undergoing a divorce often generate significant legal expenses. The party responsible for paying these fees might, in some limited instances, be able to offset these high expenses by taking a deduction in the year paid.

Generally, attorney fees paid in connection with a divorce are non-deductible personal expenses.<sup>209</sup> To the extent they are related to

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<sup>204</sup> I.R.C. § 143(b) [West Supp. 1987]. Note, however, that the abandoned spouse section contains two additional requirements, that the spouse not be a member of the same household for the last six months and that the spouse be entitled to claim the exemption for the child.

""See *supra* note 193.

""See I.R.C. § 63 (West Supp. 1987).

<sup>207</sup> Mossler, *The Impact on Matrimonials of the Tax Reform Act of 1986*, Fairshare, Oct. 1986, at 3.

<sup>208</sup> For example, the reduced tax rates under the 1986 Code will generally increase the after-tax cost of alimony payments to the payor. See generally, Courtneage, *Divorce and Tax Reform*, 18 Tax Advisor 325 (1987).

<sup>209</sup> See *United States v. Gilmore*, 372 U.S. 39 (1963); *United States v. Patrick*, 372 U.S. 53 (1963).

obtaining tax advice, however, attorney fees paid incident to divorce are deductible.<sup>210</sup> This requires an accurate allocation of legal fees, particularly if one firm has handled both the tax and nontax aspects of the divorce.<sup>211</sup>

It is customary in many jurisdictions for a working spouse to pay the nonworking spouse's legal fees incurred in connection with the divorce. The general rule is that a person cannot base a deduction on fees paid to a spouse's attorney's.<sup>212</sup> A deduction might be possible by making alimony payments to the attorney and having the payee spouse ratify the third party payment.<sup>213</sup> Another alternative with tax advantages would be for the working spouse to increase alimony payments in exchange for the nonworking spouse's agreement to pay his or her own attorney fees. If this arrangement can be worked out, the working spouse will get a deduction for the alimony payments and the nonworking spouse may be entitled to a deduction if the fees are related to tax advice.

It has also been held that a taxpayer can deduct that portion of attorney fees that are related to the procurement or collection of taxable income, such as alimony.<sup>214</sup> This rule requires an allocation if the amounts receivable by a spouse under a decree or settlement are in both taxable and nontaxable form.<sup>215</sup> Note, however, that in the converse of this situation, a spouse who incurs attorney fees in an action to reduce alimony payments is not entitled to a deduction.<sup>216</sup>

The 1986 Act has not modified the rules for deducting attorney fees incurred for obtaining a divorce. Under the new law, however, attorneys fees and all other miscellaneous itemized deductions must be reduced by an amount equal to two percent of adjusted gross in-

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<sup>210</sup>*Carpenter v. United States*, 338 F.2d 366 (Ct. Cl. 1964); Rev. Rul. 72-545, 1972-2 C.B. 179; *see also* *Munn v. United States*, 455 F.2d 1028 (1972), where the court allowed deduction of seventy percent of total attorney's bill. The 1986 Tax Reform Act limits the fees related to tax advice. I.R.C. §§ 67, 212(3) (West Supp. 1987). (Placing a two percent floor on itemized deductions).

<sup>211</sup>"The failure to keep adequate records can result in the denial of even a de minimus deduction for tax advice. *See* *Hall v. United States*, 78-1 U.S. Tax Cas. (CCH) ¶ 9126 (Ct. Cl. 1977), *adopted*, 78-1 U.S. Tax Cases 19420 (Ct. Cl. 1979); *see also* *Smith v. Commissioner*, T.C.M. (CCH) 1980-182. The amounts attributable to tax counsel should be reflected clearly on the attorney's bills.

<sup>212</sup>*Davis v. United States*, 370 U.S. 65 (1962).

<sup>213</sup>"Treas. Temp. Reg. § 1.71-1T(b) (1984) (Q and A 7); *see* I.R.C. § 71 (West Supp. 1987).

<sup>214</sup>Treas. Reg. § 1.262-1(b)(7) (1972); *see* *Wild v. Commissioner*, 42 T.C. 706 (1964), *acq.* 1967-2 C.B. 4; *Elliot v. Commissioner*, 40 T.C. 304 (1963), *acq.*, 1964-1 C.B. 4.

<sup>215</sup>Thus, for example, if the wife is to receive \$700 per month, one-half of which is alimony and one-half for child support, she is entitled to deduct one-half of the attorney's fees. *See* I.R.C. § 21211 (1982).

<sup>216</sup>"Francis A. Sutherland, 36 T.C.M. (CCH) 116 (1977).



come.<sup>217</sup> Parties incurring deductible attorneys' fees should therefore try to pay them all in one year to increase the amount of the deduction.

## VIII. CONCLUSION

The 1984 Domestic Relations Tax Reform Act and the 1986 Tax Reform Act substantially improve the tax rules relating to divorce and separation. The new rules give the separating spouses greater flexibility to control their own tax liabilities, and makes life for the domestic relations practitioner simpler. While many of the tax problems and issues encountered upon divorce have been improved and simplified, some areas in need of reform remain.

The 1984 Act's definition of alimony restores objectivity and certainty to the area of spousal support payments.<sup>218</sup> The changes greatly expand the types of payments that qualify for the deduction and give the parties increased flexibility to structure and characterize support payments. The recapture-of-"front-loading"-alimony rules, enacted in 1984 and revised in 1986, are unnecessarily complex and poorly drafted.<sup>219</sup> The new rules affect only a small category of taxpayers and can easily be circumvented, so they do not seem to further a worthwhile objective. Until these rules are modified, however, practitioners must master them to prevent potentially disastrous consequences for the client.

Another unwelcome change in the area of divorce taxation is that lump sum support payments to be reduced on any contingency relating to a child will now be characterized as child support for tax treatment.<sup>220</sup> This modification effectively reduces the ability of divorcing parents to shift income and could generate litigation and possible inequities. The poorly written temporary regulations issued by the service present a stiff challenge to the practitioner who attempts to circumvent the rules through clever draftmanship.

The 1984 Act greatly simplifies the rules relating to the allocation of dependency exemption for children of divorcing parents by giving the custodial parent the waivable right to claim the exemption.<sup>221</sup> This beneficial change gives the custodial parent leverage to insure continued support payments and should reduce costly litigation and the role of the IRS in monitoring this area.

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<sup>217</sup>I.R.C. § 67(a) (West Supp. 1987) (added by 1986 Act. *supra* note 7 § 132(a)). To the extent that miscellaneous itemized deductions do not exceed two percent of adjusted gross income they are lost: there is no carryover provision.

""See *supra* notes 10-51 and accompanying text.

""See *supra* notes 53-65 and accompanying text.

""See *supra* notes 69-79 and accompanying text.

<sup>221</sup>See *supra* notes 90-97 and accompanying text.

Another much-needed reform to the divorce tax laws was accomplished by eliminating the harsh rule that required gain to be recognized upon property transfers between spouses and former spouses incident to divorce.<sup>222</sup> The new rule, which treats these transfers as gifts for tax purposes, restores equitable tax treatment to the parties undergoing divorce in community property and common law states, and will make it possible to freely transfer appreciated property of all kinds without incurring substantial tax liability.<sup>223</sup> The new law, however, does set potentially harsh traps for the unwary recipient spouse who takes appreciated property with a low carryover basis or that is subject to encumbrances or tax liabilities.

The 1986 Tax Reform Act changes to the Code, which include revised tax rates, simplified tax brackets, and increased standard deduction and personal exemption amounts,<sup>224</sup> should be carefully considered by all divorce attorneys when negotiating agreements. Among other things, practitioners should consider the significant advantages available to taxpayers who can qualify to file their returns as heads of household or abandoned spouses.

Through proper planning, the recent reforms in domestic relations taxation should benefit most couples undergoing divorce and separation.<sup>225</sup> The laws permit the parties to elect tax options that minimize overall tax and to calculate better the tax ramifications of their agreements. For the most part, the new laws simplify technical requirements, provide objective tests for characterizing support payments, and reduce the inequities of the old system. Although recent legislation is a step in the right direction, there is still some room for improvement.

Congress should adopt a completely objective tax policy that gives the parties more freedom to apportion the tax consequences of divorce. Moreover, those areas of complexity remaining in the tax rules affecting individuals upon divorce, such as the recapture of front loading alimony payments, should be eliminated. Adopting tax laws that are simple and certain will enable divorcing couples to accurately predict the tax consequences of their settlements, arrive at fair and equitable

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<sup>222</sup> See *supra* notes 117–119 and accompanying text.

<sup>223</sup> See *supra* notes 123–136 and accompanying text. For a general overview of the impact of the 1986 Tax Reform Act on divorce tax planning, see Courtneage, *Divorce and Tax Reform*, Tax Adviser, May 1987, at 325.

<sup>224</sup> A publication discussing the 1986 Tax Reform Act is available free of charge from the I.R.S. I.R.S. Publication 920, *Explanation of the Tax Reform Act of 1986 for Individuals* (Aug. 1987).

<sup>225</sup> An excellent article reaching this conclusion and offering practical tax planning advice in light of recent legislation is Behr, *Tax Planning in Divorce: Both Spouses Benefit from the Tax Reform Act of 1984*, 21 Willamette L. Rev. 767 (1985).

solutions, and avoid the disastrous consequences associated with re-characterization of support agreements by either the courts or the IRS.

Domestic relations practitioners should become familiar with the radical changes brought about by recent tax reforms and conduct thoughtful tax planning in all cases. The increased flexibility brought about by the new laws can be used by the informed practitioner to make the tax burdens for the divorcing client better during the worst of times.

## BOOK REVIEW

### MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (2d ed.)\*

Reviewed by John F. Zink\*\*

The literature available to the practitioner in the area of military criminal law has never been as extensive as in other areas of law practice. While the various service branches, by way of their Judge Advocate General Corps, have consistently produced high quality source materials, the availability to the civilian practitioner, faced with a military justice problem, of these materials has been limited. With the publication of *Military Criminal Justice: Practice and Procedure* by Professor David A. Schlueter, lawyers now have a readily available and comprehensive practice manual for military criminal justice.

It is perhaps true that many lawyers have viewed military law as not relevant to their practice, being an area of the law confined to the professional uniformed military lawyer. This view is now shaken by the fact that military service has dramatically grown in popularity during the past decade bringing into the "ranks" a large number of our citizens and with the location of large military bases in a significant number of the states. Another factor in the importance of military law to the average practitioner is the decision of the United States Supreme Court in *Solorio v. United States*, 107 S. Ct. 2924, (1987), in which the Court held that court martial jurisdiction no longer would depend upon "service connection" of the offense, but rather solely upon the accused's "status" as a member of the Armed Forces of the United States. These factors serve to increase the likelihood that lawyers may face questions of military criminal justice in their practices.

Professor Schlueter's book provides both the military and non-military lawyer with a practical practice and procedures manual for all aspects of military justice. It is a useful guide through the preliminary procedures unique to military practice as well as an indepth trial and post trial guide. In addition, the author provides the reader

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\*Schlueter, David A., *Military Criminal Justice: Practice and Procedure* (2d ed.). Charlottesville, Virginia: The Michie Company, 1987. Pages: 890. Price: \$55.00 Publisher's address: The Michie Company, P.O. Box 7587, Charlottesville, Virginia 22906.

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with interesting background information on the foundations of the military justice system. This work brings home several important facts concerning the military justice system, dispelling many outdated beliefs about military law. The book reveals to the reader that the military justice system is well rooted in the constitutional law of this nation and draws strength from the earliest of legal codes of civilized society.

The concept that “military justice is to justice what military music is to music” is seen as out of touch with reality. Professor Schlueter describes the development of the military justice system from its roots in the British model at the time of the American Revolution through rapid growth during the twentieth century and the drafting of the Uniform Code of Military Justice. This work demonstrates that the accused before a court martial receives procedural and substantive rights that are equal or superior to those afforded a criminal defendant in civil courts. While critics may point to areas of potential abuse in the military system, potentials that are arguably present in any jurisdiction, this book describes in detail the significant procedural safeguards unique to the military justice system. It is clearly shown that the rights of the accused are the responsibility of the command, court, and prosecution, and not simply left to the defense counsel.

However, this book is much more than a study of the military justice system. It is an extremely useful practice manual for the military lawyer. The work contains over 260 pages of appendices providing a wide range of materials from useful pleading forms to a complete rendition of the Uniform Code of Military Justice and the Military Rules of Evidence. This is a book which should not only be in the library of any lawyer with a potential to practice before courts-martial, but should be a standard in-court resource for both the trial and defense counsel at trial.

## PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The publications noted in this section, like the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made their books available for this purpose.

**Imwinkelried, Edward J., Giannelli, Paul C., Gilligan, Francis A. & Lederer, Fredric I., *Courtroom Criminal Evidence*. Charlottesville, Virginia: The Michie Company. Pages: xxvii, 845. Index, table of cases. Price: \$85.00. Publisher's address: The Michie Company, 1 Town Hall Square, Charlottesville, Virginia 22901.**

New attorneys often ponder what they should say and do in the courtroom. This fundamental anxiety tends to stem from the two principal conundrums facing a trial advocate—coping with procedural issues and negotiating hurdles presented by the rules of evidence. Of course, these cornerstones to effective trial advocacy are extremely elusive to the inexperienced trial attorney.

*Courtroom Criminal Evidence* is a timely response to the inescapable fact that mastery of the rules of evidence is a sine qua non to effective trial advocacy. Recognizing the complexity of this task, however, the authors acknowledge that “one of the purposes of the text is to simplify evidence law for courtroom use.” Any critical evaluation of the work must be conducted against the backdrop of the authors' concession that the publication is “not intended as a comprehensive treatise on evidence law,” but rather a courtroom tool for trial lawyers. *Courtroom Criminal Evidence* is not a scholarly, exhaustive

work on the law of evidence, but a practical reference for the day-to-day evidentiary questions that a trial attorney faces.

The book varies from chapter to chapter in the depth of its analysis. As to be expected with so many contributors, the final product is uneven. In the initial chapters (Chapter One—Related Procedures and Chapter Two—Competency of Witnesses) the legal analysis is simple and descriptive, perhaps best-suited for the less experienced trial attorney.

The work improves, however, as the reader advances. A heightened level of analysis and writing is evident in chapter 3 (Relevance) and continues in varying degrees through chapter 8 (Character and Habit Evidence). Chapter 8 is perhaps the best written and most analytic chapter in this part of the book.

The best scholarship is evident in the discussion of constitutional evidence, which begins with chapter 18. If the intention of the authors is to provide an analytic framework that “will enable the reader to view the rules of evidence as an organic, rational whole,” then they meet their goal in the chapters dealing with evidentiary questions arising under the fourth, fifth, and sixth amendments to the United States Constitution. These chapters tend to illuminate the important constitutional evidence issues in a manner that trial attorneys can use efficiently and effectively. The authors’ treatment of constitutional evidence elevates the work to its highest plane.

Reading *Courtroom Criminal Evidence* is in some respects similar to going to a baseball game where the home team starts slowly, gradually improves, finally rises to the occasion, and plays a solid ball game. *Courtroom Criminal Evidence* has the same kind of gradually building momentum. In some areas, the experienced practitioner will find little new; in others, however, it will be a valuable addition to the evidence literature available to the criminal attorney.

**Rehnquist, William H, *The Supreme Court*. New York: William Morrow & Co., 1987. Pages 319. Price: \$18.95. Publisher’s address: William Morrow & Co., Inc., 105 Madison Avenue, New York, New York 10016**

*The Supreme Court* is Chief Justice Rehnquist’s very readable contribution to the literature surrounding the Nation’s celebration of the Constitution Bicentennial. He traces the development of Supreme Court jurisprudence by illustrating key cases from the past 200 years, ranging from *Marbury v. Madison*, through *Dred Scott v. Sanford*, to the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*. In doing so, the Chief Justice paints a very human picture of a seemingly

impersonal institution. The book takes each era of the Court, introduces us to some of the major players (Justices, Presidents, legislators, and litigants), and sets the stage by telling us of the major events affecting the country at the time. With this background, Chief Justice Rehnquist illustrates how the Court shaped (and was shaped by) national policy in its major decisions.

The informal writing style makes the book a pleasure to read for lawyers and nonlawyers alike. For those unfamiliar with the law, the Chief Justice explains even the most elementary points (e.g., what a petition for certiorari is). Yet he does so in a way that doesn't interfere with the more experienced reader's enjoyment. The only drawback (perhaps unavoidable in something written by a sitting Justice) is that the book stops with the Steel Seizure Case, and contains nothing of the court's cases from the late 1950s through the 1980s. In its place, Chief Justice Rehnquist describes how the Court works today: what happens when a petition for certiorari is filed, the mechanism for granting or denying certiorari, the effect of the briefs and oral argument, how the post-argument conferences work, and finally the publication of the written opinions. *The Supreme Court* is a book that everyone, regardless of legal training, will find valuable.

**Cox, Archibald, *The Court and The Constitution*. Boston; Houghton Mifflin Co., 1987. Pages viii, 434. Price \$19.95. Publisher's address: Houghton Mifflin Co., 2 Park Street, Boston, Massachusetts 02108**

*The Court and the Constitution* is a must for anyone who wants to understand how the Supreme Court assumed the position it has on our present society. Archibald Cox has built upon his experience as the former Watergate prosecutor to create an excellent analysis of the Court and its powers of judicial review. The book is broken into two basic sections: an historical review of the Court, and how its role developed in the 19th century and the first half of the 20th century; and a discussion of some of the issues the Court faces now.

Mr. Cox is not a neutral observer of the Court. He advocates an expansive role for judicial review and does not believe the Court should limit its authority with a narrow view of original intent. He believes, rather, that the Court should look at the conditions and ideas that motivated the framers and see how those motivations can apply in today's society. *The Court and the Constitution* is a carefully constructed argument for his view. In the historical section, Mr. Cox shows that, after *Marbury v. Madison* established the concept of judicial review, historical trends have at times forced the Court's hand in its view of the Constitution. A reader can see this most explicitly



in the discussion of the *Lochner* era, when the Court invalidated numerous pieces of social welfare legislation based on the individual's constitutional liberty and property interests in contracting freely for his services. Cox shows that this view of "liberty," while it may have been tenable at the time the Constitution was written, became increasingly outmoded in a society where large corporations and trusts grew to dominate the marketplace, and the individual's "freedom" to contract degenerated to accepting whatever employment was available on terms set by the employer. Eventually the Court was forced to discard an outmoded notion of liberty that no longer made sense, and conform its view of the Constitution to an ideal that would work in contemporary society.

The real value in Mr. Cox's book is that it is not a one-sided diatribe; like the best advocates, he acknowledges the weak points in his position, and balances opposing arguments. A reader will gain a real appreciation and deeper understanding of the debate over the court's role, regardless of what stand he or she takes.

**Berger, Raoul, *Federalism: The Founders' Design*. Norman, Oklahoma; The University of Oklahoma Press, 1987. Pages 223. Appendix, bibliography, table of cases, index. Price: \$16.95 (hard-bound).**

The bicentennial celebration of the United States Constitution and the confirmation of a new U.S. Supreme Court justice make Raoul Berger's *Federalism: The Founders' Design* a timely find in view of the fundamental thesis of his work—that many of the Court's "interpretations" of our country's charter document exemplify an ongoing revision of the Constitution, usurping an amendment process the people reserved to themselves.

Given current interest in "original intent" and "strict construction," readers may appreciate Berger's recitation of historical materials that accompanies his analysis of the relative distribution of power between the states and the federal government. The author's presentation emphasizes his theme of the historical and legal priority of the states—originally sovereign and independent of each other—which grudgingly delegated to a suspect latecomer federal government only so much power as was necessary to carry out national purposes, leaving other state powers "unimpaired," and implicitly imposing a "burden of persuasion" on those who would curtail a given state power.

Berger reminds us that dual federalism, envisioning two exclusive jurisdictions—for the federal government, certain enumerated objects only; for the states, a residual and inviolable sovereignty over all other objects—was firmly embodied in the Constitution. The Found-

ders' repeated emphasis on limited federal powers and the preservation of states' jurisdiction over "internal" and "local" matters within their own borders, the author adds, should counsel against any overly generous construction of federal powers.

Nevertheless, his historical accounts of court action indicate a contrary direction. Of prime concern, an interstate commerce clause that has been judicially expanded well beyond "the objects generally to be embraced when it was inserted in the Constitution," as that provision was seemingly clarified by James Madison, its chief architect. Instead, Berger contends, the Supreme Court has run far afield with an "imported" concept of "commerce" (beginning with Chief Justice John Marshall's opinion in *Gibbons v. Ogden*) that has resulted in a gradual takeover of internal functions the states did not ever dream of surrendering.

The general welfare clause, the author contends, was never crafted to be some legislative "wildcard" for limitless congressional spending, notwithstanding what he terms questionable Supreme Court reliance on the writings of Justice Joseph Story, himself a latecomer of some forty years to the deliberations of the Founding Fathers. The necessary and proper clause, as analyzed, bestowed no supplementary powers upon the federal government—it was only intended to enable that institution to execute those powers expressly delegated to it. Further, as Berger's research would suggest, the supremacy clause grants primacy only to those laws consistent with the Constitution. His final concern: recent Court pronouncements that have apparently reduced the tenth amendment to meaningless rhetoric, lending fresh credibility to claims that the provision is a redundant, empty declaration.

And where does this analysis lead us? Berger acknowledges he was forewarned that his monograph might be a "quixotic undertaking." But as an original intentionalist/strict constructionist/historical purist, he boldly lowers his lance and asserts that "intellectual honesty therefore constrains me to be prepared to overrule all decisions that departed from the original design."

**Shuman, Daniel L., *Psychiatric and Psychological Evidence*. Colorado Springs, Colorado; Shepard's/McGraw-Hill, 1986 (with pocket parts). Pages 465. Index, Table of Cases. Price: \$94.50 (includes current pocket part, shipping, and handling). Publisher's address: Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, Colorado 80901**

*Psychiatric and Psychological Evidence* is a wide-ranging review of the areas where psychiatry and psychology touch upon the practice of law. Part one of the book provides an introduction to psychiatry

and psychology. It begins with a survey of the theories of mental illness, a discussion of diagnostic categories and DSM III, and a listing of the different methods of treatment. The final two chapters of part one review the licensing and qualifications of psychiatrists and psychologists, and the available research literature, including MEDLINE and PsycINFO, both automated databases; *Index Medicus*; and *Psychological Abstracts*.

Part two gives the reader tips on how to obtain expert witnesses, and outlines how to qualify an expert, how to present expert psychiatric or psychological evidence, and some of the limits on such evidence. The final part discusses particular applications, ranging from competence to stand trial, the insanity defense, and sentencing considerations, to child abuse, testimonial credibility, and psychological autopsies. A particularly useful feature is at the end of each chapter. The author provides a list of suggested additional readings and WESTLAW search references, keyed to each section in the chapter. Anyone desiring up-to-date information on the topic need only type the suggested references into WESTLAW.

**Reitz, Curtis R., *Consumer Product Warranties Under Federal and State Laws* (2d ed.). Philadelphia; American Law Institute-American Bar Association Committee on Continuing Professional Education, 1987. Pages: ix, 285. index; appendices; table of cases; table of statutes, rules and regulations. Price: \$73.00 (includes postage and handling). Publisher's address: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.**

Any legal assistance attorney can tell you stories of clients who purchased products that just did not work: cars that ran poorly (or not at all), appliances that broke down, or stereo equipment that played static (but nothing else) beautifully. Gaining recompense for clients victimized by inferior goods can be a frustrating experience.

Professor Curtis Reitz is the Biddle Professor of Law at the University of Pennsylvania School of Law, where he has been a faculty member for over thirty years. Among other fields, he teaches courses in commercial law and consumer transactions. *Consumer Products Under Federal and State Laws* outlines some of the major available remedies to aggrieved consumers under warranty law. Professor Reitz wrote the first edition of the book shortly after the passage of the Magnuson-Moss Warranty Act in 1975. Although he has expanded the second edition to include state warranty laws, the bulk of the book still deals with the federal Act (though there are comparisons

with the Uniform Commercial Code). It starts with a basic question: Why have a federal warranty act in an area traditionally subject to state regulation? This section outlines the legislative history and discusses some of the abuses that Congress tried to correct. It ends with a short overview of the act and implementing regulations.

Part two deals with the disclosures that sellers of consumer goods must make, including the difference between "full" and "limited" warranties, required contents and formalities for written warranties, and the pre-sale communication of warranty terms. Part three analyzes the substance of warranties: what full warranties, limited warranties, service contracts, and implied warranties cover; who benefits from them; and for how long. Part four lists judicial and informal remedies; it includes jurisdictional questions and class actions. Part five discusses issues relating to the scope and coverage of the federal act. Part six closes the book with a short overview of state "lemon laws."

Every legal assistance attorney must be familiar with the Magnuson-Moss Warranty Act. This book gives them a logically organized and easy to understand reference. Professor Reitz's expertise does not come cheaply, however. The \$73.00 cost will be a drawback to those operating on a tight budget.

**Tomes, Jonathan P., *The Servicemember's Legal Guide*. Harrisburg, Pennsylvania; Stackpole Books, 1987. Pages 224. Glossary, index. Price \$14.95. Publisher's address: Stackpole Books, Cameron & Kelker Streets, Harrisburg, Pennsylvania 17105**

Jonathan Tomes is a retired judge advocate who prepared *The Servicemember's Legal Guide* for three stated purposes: to tell soldiers how to recognize legal problems, how to use a lawyer's advice efficiently, and how to prevent legal problems as well as solve those that do occur. The book has chapters on a myriad of problems a soldier may face, ranging from taxes and debt, through military and civilian criminal justice, to marriage and divorce. Other chapters cover enlistment, constitutional law, claims and remedies, lawsuits, property, and estate planning.

The book is valuable to the extent it sensitizes soldiers to legal problems and points them toward a judge advocate (or other attorney) to solve them. It would be dangerous, however, for a layman (or an attorney) to rely solely on the book to solve problems. The vast scope of the book necessarily means that it covers any individual area only in very general terms. In addition, specific advice can quickly become out-of-date as laws change. This limits the book's usefulness to military attorneys, and may result in incomplete or inaccurate advice if

a soldier applies the book to his or her problem. The subject-matter experts who reviewed the book for the *Review* found a number of minor inaccuracies. For example, on page 183, the author advises that a soldier may wish to register a car in the state where he or she is stationed rather than the state of domicile, to avoid the domicile state's personal property tax. Depending on state law, however, the domicile state may impose its personal property tax on the soldier's property, wherever it is located, because of 50 U.S.C. § 574(1) (1982). Bankruptcies may be included in credit reports for only ten years, rather than fourteen, as the author reports on page 189 (see 15 U.S.C. § 168c (a)(1) (1982)). Fortunately, however, the book is liberally sprinkled with exhortations to contact a legal assistance attorney for advice (or another military or civilian lawyer, if appropriate).

*The Servicemember's Legal Guide* has one message that every soldier should receive: recognize your legal problems and take them to a lawyer as soon as possible. Soldiers, however, should not have to spend \$14.95 to receive a message that commanders and their judge advocates should already be sending.

**Nagel, Stuart S., *Microcomputers as Decision Aids in Law Practice*. Westport, Connecticut; Quorum Books, 1987. Pages xxvi, 358. Index, bibliography. Price: \$45.00. Publisher's address: Quorum Books, 88 Post Road West, Box 5007, Westport, Connecticut 06881.**

*Microcomputers as Decision Aids in Law Practice* combines decision theory with computer technology to give attorneys a tool to analyze how they should organize their practice. Should a lawyer take a particular case on a percentage basis? The answer depends on factors such as the likelihood of winning, the amount of time the lawyer must spend working on the case, the percentage fee, and whether there are other, more profitable demands on the lawyer's time. By assigning discrete values to each of these variables, one can construct a model that gives an objective answer to this and similar questions. Nagel intends his book to show in general how computers can assist in these decisions, and, more particularly, how P/G%, a software package he has developed, can be an aid to a law practice. He covers four areas: predicting the outcome of future cases in light of past experience; litigation choices; allocating attorney resources; and negotiation and mediation. Mr. Nagel indicates that he will make copies of P/G% available for experimental purposes for a moderate fee to cover the cost of a floppy disk and photocopying.

The book is not a casual review; it takes some time and effort to understand the author's concepts and analysis. The book's emphasis

on the “bottom line” (i.e., which decisions will be most profitable financially) limit its utility to military attorneys, but it does demonstrate how far one can go in integrating computers into a law practice.

**Bresnick, David, *Management for Attorneys*. Livingston, New York; Human Services Press, 1987. Pages: 134. Price \$32.00 (hard-bound). Publisher's Address: David Birch Associates, Orchard Road, Livingston, New York 12541.**

Many of today's attorneys are learning that, although the skill of the individual practitioner is central to the success of a law firm, the coordination and organization of that enterprise truly determines its success. As a 1967 Columbia Law School graduate and an active management consultant and educator, David Bresnick wants more of his fellow attorneys to understand these principles—therefore this resource.

As we should know, law is the service profession par excellence, with a foremost purpose and rationale to serve the client. But we must maintain law as a business as well. Because of monopolistic and oligopolistic market conditions in the past, law firms were able to perpetuate unproductive patterns of behavior. The phenomenon of lawyer advertising underscores that a marketing perspective (i.e., client development) has, in actuality, always been a part of the American legal scene. Now, the rigors of modern-day lawyering merely dictate that we develop the very best business practices in order to survive and be successful.

In today's business-conscious environment, Bresnick contends attorneys can benefit from the experiences of other service professions to learn how to meet the various needs of our clientele. How? By adopting in varying degrees the common attributes of the best-run corporations noted within *In Search of Excellence* and other contemporary accounts of successful business management in action.

*Management for Attorneys* reminds us that, without practice development, there can be no practice. And, to cultivate clientele, lawyers must know who those clients are, what they want, and what brings them back. To help, Bresnick urges that practitioners need to conduct responsible market structure and consumer analyses, then devise a systematic plan for gathering information about their clientele.

The author observes that the basically ad hoc nature of legal supervision makes it difficult to overcome the strong professional orientation of attorneys—they really would rather be lawyering. To be

successful manager, though, they have to focus not on getting the job done themselves, but through others. The book stresses that lawyer-managers must provide effective leadership for the firm, monitor progress toward clearly defined goals, and successfully handle relationships with others. As part of this presentation, Bresnick provides some general advice on law firm leadership, motivation, management by objectives, and staff development. Also included is helpful guidance on listening skills, effective feedback, interviewing techniques, and conducting worthwhile meetings.

Bresnick acknowledges that his book "is no panacea" and does "not provide all the answers." "This book is designed for the busy attorney," he continues, while adding that comprehensiveness and brevity were not necessarily compatible goals in his presentation. For the busiest attorneys who may need—or expect—the most concentrated guidance from this work, its discussion rarely extends beyond the basic "framework" that Bresnick provides.

To his credit, though, the author concludes each of the seven chapters with a listing of more focused, practice-oriented source materials. The responsible attorney with an inclination toward managerial education and improvement may find this to be the book's primary strong point.

**Kennedy, Paul, *The Rise and Fall of Great Powers*. New York; Random House, 1987. Pages: xxv, 677. Index, bibliography. Price: \$24.95. Publisher's address: Random House, Inc. New York, New York 10022**

How do nations achieve power and why do they eventually lose it? Paul Kennedy attempts to answer these questions in *The Rise and Fall of Great Powers*. He traces the ebbs and flows of international politics from 1500 to the present, to illustrate how economic power interacts with military might. Kennedy believes that economic considerations drive military strategy: nations use military force in pursuit of and to defend their economic interests. Nations become more powerful when the cost of their military ventures is offset by the resultant economic gains. Eventually, however, the nation may fall victim to "imperial overstretch" as the expense of an expanding military structure outstrips the nation's economic capability to support it. The nation then falls from power and new players rise in the international arena.

Kennedy traces this pattern over the last 500 years to support his theory: in a protracted conflict, victory goes to the economically strong; on the other hand, a skewed tilt toward military might at the expense of economic and technological advancement eventually causes a na-

tion's decline. The **book** closes with an analysis of the present world situation that has controversial implications for today's superpowers. Kennedy is an excellent writer, and his ideas are easy to follow. His thesis is not novel and should be readily apparent to anyone who has considered international politics logically. Nevertheless, *The Rise and Fall of **Great Powers*** is both a good analysis of the past and a thought-provoking reflection on the future.

By Order of the Secretary of the Army:

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U.S. GOVERNMENT PRINTING OFFICE: 1988-181-047:60001